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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

MARISOL A., by her next friend,
Rev. Dr. James Alexander Forbes, Jr., *et al.*,

Petitioners,

—v.—

RUDOLPH W. GIULIANI, as Mayor of the
City of New York, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

When the 10-day period for seeking interlocutory appeal from the circuit court under 28 U.S.C. § 1292(b) (1994) has expired, may a district court circumvent the 10-day jurisdictional time limitation imposed by § 1292(b) and Federal Rule of Appellate Procedure 5(a), and specifically made inalterable by Federal Rules of Appellate Procedure 2 and 26(b), by recertifying an interlocutory order for appeal for the sole purpose of extending the time for filing a petition with the circuit court?

PARTIES BELOW

The underlying litigation involves a certified class of child plaintiffs who are the legal responsibility of the New York City child welfare system, and who have brought an action under, *inter alia*, 42 U.S.C. § 1983 (1994), as amended, in the United States District Court for the Southern District of New York. Plaintiffs allege that the New York City child welfare system has failed to meet its legal obligations to protect their safety and well-being. The named plaintiff-class representatives include eleven children who, pursuant to Federal Rule of Civil Procedure 17(c), appear by adult next friends: Marisol A., by her next friend, Rev. Dr. James Alexander Forbes, Jr.; Lawrence B., by his next friend, Professor Mitchell I. Ginsberg; Thomas C., by his next friend, Dr. Margaret T. McHugh; Shauna D., by her next friend, Professor Kathryn Conroy; Ozzie E., by his next friends, Jill Chaifetz and Kim Hawkins; Darren F. and David F., by their next friends, Juan A. Figueroa and Rev. Marvin J. Owens; Bill G. and Victoria G., by their next friend, Sister Dolores Gartanutti; Brandon H., by his next friend, Thomas J. Moloney; and Steven I., by his next friend, Kevin Ryan, on their own behalf and on behalf of and all others similarly situated. The defendants are Rudolph W. Giuliani, Mayor of the City of New York; Marva Livingston Hammons, Administrator of the Human Resources Administration and Commissioner of the Department of Social Services of the City of New York; Nicholas Scoppetta, Commissioner of the New York City Administration for Children's Services; George E. Pataki, Governor of the State of New York; and Brian Wing, Acting Commissioner of the Department of Social Services of the State of New York.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully submit that a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit in this case, entered on December 10, 1996 and January 8, 1997, respectively.

OPINIONS AND ORDERS BELOW

The opinion of the court of appeals, review of which is sought here, is to be reported at 104 F.3d 524 and is reprinted in the Appendix hereto at 1a-12a. The district court order granting plaintiffs' motion for class certification is unreported and is reprinted in the Appendix hereto at 34a. The district court opinion certifying the plaintiff class is reported at 929 F. Supp. 662 (S.D.N.Y. 1996). The district court order amending its class certification order and certifying it for interlocutory appeal is unreported and is reprinted in the Appendix hereto at 32a. The district court order recertifying its class certification order is unreported and is reprinted in the Appendix hereto at 19a.

JURISDICTION

The judgment of the court of appeals from which petitioners seek review was entered on December 10, 1996 and the accompanying opinion was filed on January 8, 1997. This petition is timely filed within 90 days of the December 10, 1996 judgment.

The district court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1343(a)(3) and 1367(a) (1994). The court of appeals invoked jurisdiction to hear the ensuing appeals pursuant to 28 U.S.C. § 1292(b) (1994). The jurisdiction of this Court to review the judgment of the court of appeals is invoked under 28 U.S.C. § 1254(1) (1994).

STATUTORY PROVISIONS INVOLVED

The text of 28 U.S.C. § 1292(b) is set forth in the Appendix hereto at 37a. The text of Rule 2 of the Federal Rules of Appellate Procedure is set forth in the Appendix hereto at 37a. The text of Rule 5(a) of the Federal Rules of Appellate Procedure is set forth in the Appendix hereto at 37a-38a. The text of Rule 26(b) of the Federal Rules of Appellate Procedure is set forth in the Appendix hereto at 38a.

STATEMENT OF THE CASE

This petition arises from the determination of the United States Court of Appeals for the Second Circuit that the district court may *recertify* an order for interlocutory appeal. In this case, defendants failed to petition the Second Circuit for permission to appeal within the 10-day period following the district court's certification of its order certifying the plaintiff class for interlocutory review under 28 U.S.C. § 1292(b). This 10-day period, established by both § 1292(b) and Federal Rule of Appellate Procedure 5(a), is explicitly rendered inalterable by Federal Rules of Appellate Procedure 2 and 26(b). Lapse of the district court's section 1292(b) certification ordinarily would have relegated the defendants to the remedy of all litigants, post-trial review of the class certification order in accordance with the Final Judgment Rule.[1] Here, however, the

[1] Failure to comply with the jurisdictional requirements for interlocutory appellate review would be without prejudice to the defendants' right to raise the same issue after final judgment. *See, e.g., Clark* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 924 F.2d 550, 553 (4th Cir.), *cert. denied*, 502 U.S. 818 (1991) (" 'failure to take an authorized appeal from an interlocutory order . . . does not preclude raising the question on appeal from the final judgment' ") (quoting *Drayer* v. *Krasner*, 572 F.2d 348, 353 (2d Cir.), *cert. denied*, 436 U.S. 948 (1978)); *Balla* v. *Idaho State Board of Corrections*, 869 F.2d 461, 468 (9th Cir. 1989) ("[W]hen no such appeal is taken from an interlocutory order, 'the interlocutory order merges in the final judgment and may be challenged in an appeal from that judgment.' ") (citation omitted).

district court *recertified* its interlocutory order for the sole purpose of extending defendants' time to seek leave to appeal. In so doing, the district court effectively rendered meaningless the 10-day jurisdictional time limitation established by both statute and the applicable implementing federal rules.

A. The Proceedings Below

On December 13, 1995, this civil rights action was filed on behalf of children who are the legal responsibility of New York City's child welfare system pursuant to, *inter alia*, 42 U.S.C. § 1983 (1994), as amended, against the Mayor of the City of New York, the Commissioner of the City's Department of Social Services, the Commissioner of the City's Child Welfare Administration[2] (hereinafter collectively the "City defendants"), the Governor of the State of New York, and the Acting Commissioner of the State Department of Social Services (hereinafter collectively the "State defendants"). The plaintiffs allege federal and state constitutional and statutory violations, citing to a pattern of actions and inactions by the defendants in failing to protect the safety and well-being of New York City's abused and neglected children. The plaintiff children seek declaratory and injunctive relief to vindicate and protect their rights.

On June 18, 1996, the district court (Ward, J.) issued an opinion resolving a series of initial motions in the litigation, including granting plaintiffs' motion for class certification. 929 F. Supp. 662 (S.D.N.Y. 1996). On July 3, 1996, Judge Ward entered an order effecting his opinion. (Reprinted in the Appendix hereto at 34a-36a.)[3]

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[2] Effective February 12, 1996, this agency was renamed the Administration for Children's Services.

[3] The certified class includes: "All children who are or will be in the custody of the New York City Administration for Children's Services ("ACS"), and those children who, while not in the custody of ACS, are or will be at risk of neglect or abuse and whose status is or should be known to ACS." (App. 36a.) Citations to "App. ___" refer to the Appendix to this petition.

In late July, the City defendants requested that the district court certify the portion of its July 3, 1996 order that granted class certification for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) and Federal Rule of Appellate Procedure 5(a). On July 26, 1996, Judge Ward issued an order containing section 1292(b)'s requisite language and certifying the class certification order for immediate appeal. (Reprinted in the Appendix hereto at 32a-33a.)[4] This order commenced the 10-day period within which defendants could timely petition the circuit court for leave to appeal. Ten days passed without application to the Second Circuit by any of the defendants.

On August 8, 1996, at a status hearing before the district court (excerpts of which are reprinted in the Appendix hereto at 21a-29a), the defendants, without notice to plaintiffs, asked the court to recertify its July 3, 1996 order to provide them with a second opportunity to file a "timely" petition for appeal. (App. 23a-24a.) The defendants conceded that the sole reason they had failed to comply with the 10-day deadline was a miscalculation of the time period. (App. 23a.) Over plaintiffs' objections, the district court granted defendants' oral application in open court on August 8th. (App. 28a.)[5]

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[4] It was unclear at the time whether the State defendants had joined in the City defendants' request to the district court to certify its class certification order for immediate appeal. Thus the district court's July 26, 1996 order refers only to a petition by the City defendants. (App. 32a-33a.) On August 7, 1996, the district court approved a stipulation between the plaintiffs and State defendants deeming the State defendants to have joined the City defendants' initial request for interlocutory appeal of the class certification order. (App. 30a.) This stipulation explicitly did not alter the time within which the State defendants had to seek leave to appeal following the district court's initial certification. (App. 30a.)

[5] This matter was raised in open court, with no motion having been filed or notice provided to plaintiffs, and was resolved by the district court in a decision from the bench at the same hearing. Thus while plaintiffs objected, they had no opportunity to research or brief the issue. (App. 25a, 28a.)

On August 9, 1996, the district court entered an order recertifying its July 3, 1996 order for interlocutory appeal. (Reprinted in the Appendix hereto at 19a-20a.) On August 14, 1996, the defendants filed petitions for leave to appeal with the United States Court of Appeals for the Second Circuit. A panel of the Second Circuit granted defendants' petitions for appeal on September 3, 1996. (Reprinted in the Appendix hereto at 16a-18a.)

Plaintiffs-appellees subsequently moved to dismiss the appeals for lack of appellate jurisdiction. Asserting that section 1292(b) and Rule 5(a)'s 10-day time limit is both mandatory and jurisdictional, plaintiffs argued that the district court's recertification was improper and the appellate court was therefore powerless to consider the appeals.[6]

B. The Decision of the Court of Appeals

In an order dated December 10, 1996, the Second Circuit denied plaintiffs' motion to dismiss the appeals. (Reprinted in the Appendix hereto at 13a-15a.) Recognizing that "[n]either this circuit nor the Supreme Court has squarely addressed the issue of whether a circuit court has jurisdiction to consider a § 1292(b) petition in this situation" (App. 6a) and that the other circuits are divided on this jurisdictional issue, the Second Circuit set forth its reasoning in an opinion filed on January 8, 1997. (104 F.3d 524; App. 6a-10a.) Acknowledging that the 10-day time limit and the applicable Federal Rules of Appellate Procedure "constitute a jurisdictional limit on the circuit court's power to consider a petition for leave to appeal" (App. 6a), the Second Circuit nonetheless concluded that the district court had discretion to recertify its order for interlocutory appeal, and the circuit court thus had jurisdiction over the defendants' appeals. (104 F.3d 524; App. 11a-12a.)

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[6] The City defendants are represented separately from the State defendants and each filed separate appeals. The two appeals raise the same questions and have been consolidated by the Second Circuit.

"In light of varying approaches in other circuits to the jurisdictional issues raised by plaintiffs" (App. 3a), the Second Circuit surveyed the conflicting circuits' approaches, dividing them into three distinct categories: (i) the Sixth Circuit's absolute prohibition of recertification; (ii) the First and Fifth Circuits' extremely liberal approach; and (iii) the moderate view of the Seventh and Ninth Circuits. (104 F.3d 524; App. 7a-10a.) Adopting the third approach, the Second Circuit held that a court of appeals may exercise jurisdiction over a petition to appeal from a recertified interlocutory order if such jurisdiction would serve judicial efficiency. (104 F.3d 524; App. 9a.)

REASONS FOR GRANTING THE WRIT

I. WITHOUT GUIDANCE FROM THIS COURT, A SIGNIFICANT SPLIT AMONG THE CIRCUITS WILL CONTINUE TO PRODUCE INCONSISTENT AND CONFLICTING RESULTS REGARDING WHEN, IF AT ALL, A DISTRICT COURT MAY RECERTIFY AN INTERLOCUTORY ORDER FOR THE SOLE PURPOSE OF EXTENDING THE TIME FOR FILING A PETITION FOR PERMISSION TO APPEAL WITH THE CIRCUIT COURT.

This case raises the important question of whether district courts may effectively abrogate the plain meaning of 28 U.S.C. § 1292(b) and Federal Rules of Appellate Procedure 2, 5(a) and 26(b) by recertifying interlocutory orders for immediate appeal for the sole purpose of permitting otherwise time-barred petitions, thereby extending the jurisdiction of the circuit courts over a class of appeals the circuits would otherwise be powerless to consider.[7]

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[7] 28 U.S.C. § 1292(b) provides for appeal only "if application is made to [the court of appeals] within ten days after the entry of the order." (App. 37a.) Fed. R. App. P. 5(a) allows for amendment of the original district court's order to include the language prescribed by section 1292(b)

Lack of definitive guidance from this Court has resulted in conflict and confusion among the circuit courts on this jurisdictional question. That the circuit split involves an important question of federal appellate jurisdiction makes this case all the more worthy of this Court's plenary review.[8]

As the Second Circuit acknowledged herein, this Court's silence on the question of recertification has resulted in three distinct and inconsistent lines of authority among the circuits that belie a clear understanding of when, if at all, recertification is permissible. (104 F.3d 524; App. 6a-9a.) The Sixth Circuit's plain meaning approach strictly construes the 10-day time period and prohibits recertification for the purpose of extending the time to petition for appeal. Conversely, the First and Fifth Circuits permit blanket recertification by the district courts at their discretion. The Seventh, Ninth, arguably Third, and now Second Circuits have adopted a more moderate approach, condoning recertification under certain circumstances. The inconsistent reasoning advanced within this third group of circuits, along with a Seventh Circuit opinion questioning the soundness of the third approach, has exacerbated

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and states that "permission to appeal may be sought within 10 days after the entry of the order as amended." (App. 37a-38a.) Fed. R. App. P. 26(b) prohibits circuit courts from "enlarg[ing] the time for filing . . . a petition for permission to appeal" (App. 38a), and Fed. R. App. P. 2 precludes suspension of this prohibition. (App. 37a.)

[8] *See, e.g., Frazier* v. *Heebe*, 482 U.S. 641, 645 (1987) (noting Supreme Court's ability to "exercise its inherent supervisory power" over lower federal courts); *Hanna* v. *Plummer*, 380 U.S. 460, 463 (1965) (reviewing lower court holding regarding interpretation of Federal Rule of Civil Procedure "[b]ecause of the threat to the goal of uniformity of federal procedure posed by the decision below"); *see also* Robert L. Stern, *et al.*, *Supreme Court Practice* § 4.15, at 191-92 (7th ed. 1993) ("On the Supreme Court rests the prime responsibility for the proper functioning of the federal judiciary. The grant of certiorari in cases involving federal jurisdiction, practice, and procedure reflects that responsibility. Such cases qualify for review by reason of their importance, novelty, or difficulty, with a conflict of decisions also playing a significant role.")

the federal courts' confusion regarding the propriety of recertification.

A. The Plain Meaning Approach

In *Woods* v. *Baltimore & Ohio R.R.*, 441 F.2d 407 (6th Cir. 1971) (*per curiam*), the Sixth Circuit recognized the 10-day jurisdictional limit of section 1292(b) and Fed. R. App. P. 5(a) as prohibiting the district courts from recertifying an interlocutory order "for the sole purpose of permitting the party wishing to take an appeal to make a timely application." *Id.* at 408. The Sixth Circuit first noted that under Fed. R. App. P. 26(b) "the Courts of Appeals are specifically prohibited from enlarging the time period prescribed for filing of a petition for permission to appeal,"[9] and that "nothing in the civil or appellate rules gives the District Court the power to extend the time." *Id.* The Sixth Circuit concluded that "it is abundantly clear that the District Court was attempting to do by indirection that which neither it nor this Court could do directly, *i.e.*, extend the jurisdictional period of time which the petitioners had permitted to elapse. Accordingly, this Court is without jurisdiction to entertain the interlocutory appeal." *Id.*; *see also Nakhleh* v. *Chemical Construction Corp.*, 366 F. Supp. 1221 (S.D.N.Y. 1973) (agreeing with Sixth Circuit that district court may not indirectly cure an appellate jurisdictional defect, even if it may wish to do so under circumstances).

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[9] As the Second Circuit acknowledged, the law is clear that a would-be appellant's failure to meet the 10-day deadline constitutes a jurisdictional defect that the *circuit* courts are powerless to excuse or correct. (*See* 104 F.3d 524; App. 6a) ("Plaintiffs correctly note that these rules constitute a jurisdictional limit on the circuit court's power to consider a petition for leave to appeal"); *see also Baldwin County Welcome Center* v. *Brown*, 466 U.S. 147, 161 n.7 (1984) (*per curiam*) (Stevens, J., dissenting) (citing cases from 3d, 4th, 5th, 6th, 7th, 8th, 10th and 11th Circuits).

B. The Liberal Approach

The First and Fifth Circuits have taken a decidedly more liberal approach to recertification, blanketly permitting district courts to recertify interlocutory orders for immediate appeal. *See, e.g., Aucoin* v. *Matador Services, Inc.*, 749 F.2d 1180 (5th Cir. 1985); *Aparicio* v. *Swan Lake*, 643 F.2d 1109 (5th Cir. 1981); *In re La Providencia Development Corp.*, 515 F.2d 94 (1st Cir. 1975) (*per curiam*). This approach leaves recertification solely within the district court's discretion, the exercise of which triggers a new 10-day period in which to petition for appellate review. *See In re La Providencia*, 515 F.2d at 95 & n.1 (permitting recertification " 'in order that the parties not be deprived of a timely appellate decision' ") (quoting from district court opinion with approval).[10]

C. The Moderate Approach

Expressly rejecting the plain meaning approach as unduly strict and the liberal approach as effectively eliminating the 10-day jurisdictional limit, the Seventh and Ninth Circuits have adopted an intermediate approach that condones district court recertification under certain circumstances, and relies on the circuit courts to review the recertification for abuse of discretion. *See, e.g., Benny* v. *England (In re Benny)*, 812 F.2d 1133 (9th Cir. 1987); *Nuclear Engineering Co.* v. *Scott*, 660 F.2d 241 (7th Cir. 1981), *cert. denied*, 455 U.S. 993 (1982). This moderate approach evaluates recertification by balancing various factors, including what these circuits refer to as section 1292(b)'s purpose of fostering judicial efficiency. In

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[10] Several courts have criticized the First and Fifth Circuits' approach as too liberal. *See Benny* v. *England (In re Benny)*, 812 F.2d 1133, 1137 (9th Cir. 1987) (stating that First and Fifth Circuits' "liberal approach to recertification . . . effectively eliminates the ten-day jurisdictional limit completely by allowing apparently uncontrolled and repeated recertification"); (*see also* 104 F.3d 524; App. 9a) (agreeing with Ninth Circuit that Fifth Circuit's liberal approach "effectively eliminate[s] the ten-day jurisdictional limit").

Nuclear Engineering, the Seventh Circuit held that an appeal taken from a recertified order should not be dismissed for want of jurisdiction, provided that the appeal will further the purpose of section 1292(b). 660 F.2d at 247. Similarly in *In re Benny*, the Ninth Circuit held that where a district court recertifies an order for interlocutory appeal, the court of appeals may exercise jurisdiction over the recertified order provided it undertakes a "critical inquiry" and determines that jurisdiction over the appeal will promote judicial efficiency. 812 F.2d at 1137. *See also Myles* v. *Laffitte*, 881 F.2d 125, 126 n.2 (4th Cir. 1989) (suggesting in dicta evaluation of several factors); *Braden* v. *University of Pittsburgh*, 552 F.2d 948, 955 (3d Cir. 1977) (considering fault, extent of delay and prejudice to appellee).

In its opinion below, the Second Circuit explicitly followed the moderate approach of the Seventh and Ninth Circuits (App. 9a), concluding that the district court may, in some cases, recertify an order for interlocutory appeal for the sole purpose of permitting a second opportunity to file a timely petition for appeal. (104 F.3d 524; App. 10a-12a.) The Second Circuit held that recertification is within the district court's discretion, and that this discretion may be exercised after considering various factors that focus on "ensuring that the goal of § 1292(b)" is met. (104 F.3d 524; App. 10a.)

Although purportedly consistent with the third approach, the Second Circuit's holding in fact conflicts with the holdings of the other moderate circuits. The Seventh Circuit has stated that an order may not be recertified for immediate appeal where, as here, the initial certification lapsed solely by neglect of counsel. *See Nuclear Engineering Co.*, 660 F.2d at 246 (noting that principal common to most cases on point "is that a district court may not reenter a certification order to enlarge the time for appeal when the failure to timely appeal from the original certification order was due solely to mere neglect of counsel"); *see also Baldwin County Welcome Center* v. *Brown*, 466 U.S. 147, 162 (1984) (*per curiam*) (Stevens,

J., dissenting) (quoting Seventh Circuit on this point).[11] The other moderate circuits have permitted recertification where, unlike here, the appellant had no meaningful opportunity to meet the initial 10-day deadline. *See, e.g., Nuclear Engineering Co.*, 660 F.2d at 246 (recertification permitted where lapse stemmed from mutual misunderstanding of parties and district court); *see also Braden*, 552 F.2d at 950 (recertification permitted where appellant had not received notice of initial certification).[12]

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[11] While Fed. R. App. P. 5(a) provides for amending an order to include the certifying language, it does not expressly or implicitly provide for extending the time to appeal in any other circumstance. (App. 37a-38a.) However, even where Congress has expressly provided for extending the time to appeal as of right under Fed. R. App. P. 4(a)(5) for "excusable neglect," the circuit courts consistently refuse to find neglect of counsel "excusable." *See, e.g., State of Oregon* v. *Champion International Corp.*, 680 F.2d 1300, 1301 (9th Cir. 1982) (*per curiam*) (inadvertence or mistake of counsel does not constitute excusable neglect); *Parke-Chapley Construction Co.* v. *Cherrington*, 865 F.2d 907, 911-12 (7th Cir. 1989) (counsel's misconstrual of rules of procedure does not constitute "excusable neglect"); *Livingston* v. *State of South Carolina*, Nos. 86-7735, 87-7590, 1988 WL 1029, *1 (4th Cir. Jan. 7, 1988) (attorney's failure to correctly calculate time period requirements of Rule 4(a) constitutes attorney error, not excusable neglect). Similarly, neglect of counsel does not constitute "excusable neglect" for purposes of relieving parties from final judgment under Federal Rule of Civil Procedure 60(b)(1). *See Cavaliere* v. *Allstate Insurance Co.*, 996 F.2d 1111, 1114 (11th Cir. 1993) (counsel's oversight does not constitute excusable neglect); *Peake* v. *First National Bank & Trust Co.*, 101 F.R.D. 544, 546-47 (W.D. Mich. 1984) (attorney error is not excusable neglect).

[12] Underscoring the inconsistencies of the various circuits' approaches, the Third Circuit's approach in *Braden* has been variously categorized as moderate, strict and liberal. (*See* 104 F.3d 524; App. 10a) (characterizing Third Circuit's approach as similar to moderate approaches of Seventh and Ninth Circuits); *see also In re Benny*, 812 F.2d at 1136 (stating that Third Circuit has adopted reasoning similar to strict Sixth Circuit approach); *Aparicio*, 643 F.2d at 1112 (adopting Third Circuit's reasoning in fashioning Fifth Circuit's liberal approach); *Nuclear Engineering Co.*, 660 F.2d at 246 (characterizing Third Circuit's approach as "[t]he most flexible").

Finally, the Seventh Circuit, in which the moderate approach originated (*see* App. 9a), has remarked that its earlier holding in *Nuclear Engineering Co.* "remains controversial." *Weir* v. *Propst*, 915 F.2d 283, 286 (7th Cir. 1990) (Posner, J.) (citing *Baldwin County Welcome Center* v. *Brown*, 466 U.S. 147, 161-62 (1984) (*per curiam*)). Thus the moderate approach has been called into question by its circuit of origin.[13]

Only a single dissenting opinion of this Court has addressed the issue of recertification under 28 U.S.C. § 1292(b). In *Baldwin County Welcome Center* v. *Brown*, 466 U.S. 147, 152-53 (1984) (*per curiam*), Justice Stevens, joined in dissent by Justices Brennan and Marshall, criticized the majority for permitting the "jurisdictional limitation . . . simply [to] escape[ ] the attention of the Court" and deciding the case on the merits without mention of the threshold jurisdictional question.[14] Recognizing that "[t]here is a conflict in the Circuits on this jurisdictional question," Justice Stevens

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[13] Emphasizing the importance of timeliness in interlocutory appeals, the Seventh Circuit in *Weir* imposed a time limitation even on the district court's authority to *amend* an order to include the statement prescribed by § 1292(b), despite the fact that amendment—as opposed to recertification—is expressly permitted "at any time" by Fed. R. App. P. 5(a). *Id.* at 286-87.

[14] The majority opinion in *Baldwin County*, albeit construing a different statute, is nonetheless instructive. Adhering to the plain language of 42 U.S.C. § 2000e-5(f)(1) (1994), the majority held that a *pro se* plaintiff-employee who failed to file a complaint within the 90-day period prescribed by statute forfeited her right to pursue a claim under Title VII. *Baldwin County*, 466 U.S. at 148. The Court held that:

> Procedural requirements established by Congress for gaining access to the federal courts are not to be disregarded by courts out of vague sympathy for particular litigants. As we stated in *Mohasco Corp.* v. *Silver*, 447 U.S. 807, 826. . . (1980), "in the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law." *Id.* at 152.

acknowledged that "the jurisdictional question here is a close one, and . . . we should not decide it in a summary fashion." *Id.* at 161.

Today, even after *Baldwin County*, the division among the circuits shows no sign of healing as federal courts continue to render inconsistent and conflicting decisions on this important jurisdictional question.[15] Petitioners respectfully urge the Court to address this jurisdictional issue and replace the prevailing confusion with guided uniformity.

II. THE HOLDING THAT DISTRICT COURTS MAY RECERTIFY INTERLOCUTORY ORDERS FOR IMMEDIATE APPEAL CONFLICTS WITH THE PLAIN MEANING OF BOTH 28 U.S.C. § 1292(b) AND FEDERAL RULES OF APPELLATE PROCEDURE 2, 5(a) AND 26(b), AND WITH THIS COURT'S RECENT RULING IN *CARLISLE* v. *UNITED STATES*.

A. The Plain Meaning of 28 U.S.C. § 1292(b) and Federal Rules of Appellate Procedure 2, 5(a) and 26(b)

In 1958, Congress enacted the Interlocutory Appeals Act, providing a limited exception to the centuries-old Final Judgment Rule that requires final judgment from the district court before appeal may be entertained in the court of appeals.[16]

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[15] After *Baldwin County*, the Fourth Circuit stated that "[i]t is not clear . . . whether a district court may in effect enlarge the time for appealing from a certified order by vacating and reentering or amending an order of certification so as arguably to commence the running anew of the 10 day period." *Myles* v. *Laffitte*, 881 F.2d 125, 126 n.2 (4th Cir. 1989). Several other circuits that have addressed this question after *Baldwin County* have not referred to the case at all, indicating a belief that the case did not settle the question. *See In re Benny*, 812 F.2d 1133 (9th Cir. 1987); *Aucoin*, 749 F.2d 1180 (5th Cir. 1985).

[16] The Federal Judiciary Act of 1789 provided for appeals from final judgments or decrees only. Judiciary Act of 1789, ch. 20 §§ 21, 22, 25, I Stat. 73, 83-86 (1789); Note, *Interlocutory Appeals in the Federal*

The Interlocutory Appeals Act, codified at 28 U.S.C. § 1292(b), provides limited circumstances under which a district court may certify an interlocutory order for immediate appeal.[17] By its express language, section 1292(b) allows the circuit court to "permit an appeal to be taken from such [certified] order, *if application is made to it within ten days after the entry of the order.*" 28 U.S.C. § 1292(b) (App. 37a) (emphasis supplied).

Federal Rule of Appellate Procedure 5(a), enacted by Congress in 1967, permits the district courts to amend interlocutory orders to include the certifying language required by 28 U.S.C. § 1292(b), thereby allowing interlocutory appeal where an order had not previously been certified.[18] Thus, the 10-day jurisdictional time period commences to run from either the date of the original interlocutory order, or the date such order is amended to include the requisite language of § 1292(b). Fed. R. App. P. 5(a) (App. 37a-38a.) (*See also* 104 F.3d 524; App. 6a.) Rule 5(a) thus provides the would-be appellant the full 10-day period in which to petition the circuit court, regardless of whether the district court included the certifying language at the time it first issued the interlocutory order. *See* Fed. R. App. P. 5(a) advisory committee's notes.

As consistently recognized by the circuit courts, the 10-day time limit prescribed by section 1292(b) and Fed. R. App. P. 5(a) constitutes a jurisdictional limitation on the circuit court's power to entertain an application for leave to appeal.

Courts Under 28 U.S.C. § 1292(b), 88 Harv. L. Rev. 607, 608 n.7 (1975) ("The requirement that appeals be from final judgments was recognized in the Judiciary Act of 1789. . . ."). This rule remains in effect today, codified at, *inter alia*, 28 U.S.C. § 1291 (1994), which provides the courts of appeals with jurisdiction over "final decisions of the district courts."

[17] *See supra* note 7. The full text of 28 U.S.C. § 1292(b) appears in the Appendix at 37a.

[18] *See supra* note 7. The full text of Fed. R. App. P. 5(a) is reprinted in the Appendix at 37a-38a.

See supra notes 7, 9 and accompanying text. Indeed, under Fed. R. App. P. 26(b), the circuit courts are expressly forbidden from "enlarg[ing] the time for filing a . . . petition for permission to appeal." *See Griggs* v. *Provident Consumer Discount Co.*, 459 U.S. 56, 61 n.3 (1982) (*per curiam*); *Tranello* v. *Frey*, 962 F.2d 244, 248 (2d Cir.), *cert. denied*, 506 U.S. 1034 (1992); *Braden*, 552 F.2d at 951. The importance of Rule 26(b) and Congress's intent that the circuit courts' jurisdiction over interlocutory appeals be limited is emphasized by Fed. R. App. P. 2, which permits circuit courts to suspend the requirements of the rules of appellate procedure in particular cases for "good cause shown . . . *except as otherwise provided in Rule 26(b).*" (App. 37a) (emphasis supplied). No statutory authority either expressly or implicitly authorizes the district courts to extend the circuit courts' jurisdiction over interlocutory appeals once the 10-day certification has expired. (104 F.3d 524; App. 6a.) *See also Braden*, 552 F.2d at 951; *Woods*, 441 F.2d at 408.[19]

In *Connecticut National Bank* v. *Germain*, 503 U.S. 249, 253-54 (1992), construing the statute at issue here, this Court stated:

> [C]anons of construction are no more than rules of thumb that help courts determine the meaning of legislation,

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[19] By contrast, Fed. R. App. P. 4(a), applicable to appeals as of right, expressly permits the district courts to extend the time to appeal for 30 days where "excusable neglect" can be shown. *See supra* note 11; *see also Nuclear Engineering Co.*, 660 F.2d at 246 n.8; *Braden*, 552 F.2d at 951. An analogous provision is markedly absent from Rule 5(a), indicating that district courts may not consider excusable neglect and extend Rule 5(a)'s jurisdictional time limit. *See Myles*, 881 F.2d at 127; *see also Carlisle* v. *United States*, ___ U.S. ___, 116 S. Ct. 1460, 1465 (1996) (inclusion of a phrase in one part of statute and its notable absence in another should read to provide a meaningful distinction); *Keene Corp.* v. *United States*, 508 U.S. 200, 208 (1993) (stating " '[W]here Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.' " (citations omitted)).

> and in interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. . . . When the words of a statute are unambiguous, then, this first canon is also the last: "judicial inquiry is complete." (citations omitted.)

In this case, the Second Circuit needed look no further than the unambiguous language of section 1292(b) and Fed. R. App. P. 5(a) to determine that defendants' time to seek interlocutory appeal had lapsed, and that this jurisdictional defect could not be cured. Instead, the Second Circuit construed these laws to mean something other than what they plainly say. (*See* 104 F.3d 524; App. 9a-11a.) *See also Aparicio*, 643 F.2d at 1112 (relying on strained reading of legislative intent to conclude that district court "may reenter the interlocutory order and thus trigger a new ten-day period"). It is clear from both the statute and the rule that a would-be appellant has only ten days from the time an interlocutory order is certified to petition the circuit for appeal. *See* 28 U.S.C. § 1292(b); Fed. R. App. P. 5(a); (App. 37a-38a). Defendants here failed to meet the deadline.

The Second Circuit's attempt to overcome the jurisdictional defect by permitting the order to be "recertified" contradicts the plain language of section 1292(b) and Rule 5(a) no less than if the circuit itself had directly extended the time period to 11, 15 or, indeed, 100 days. In holding that the district court could recertify its order, the Second Circuit impermissibly ventured beyond the unambiguous language of both the statute and its implementing rules and negated their clear and plain meaning. While the Second Circuit properly acknowledged that section 1292(b)'s ten-day period is jurisdictional, the court effectively nullified this jurisdictional limitation by permitting the district court to recertify its order solely to begin a second ten-day period.

B. *Carlisle* v. *United States*

The Second Circuit's decision below is also in direct conflict with this Court's recent holding in *Carlisle* v. *United States*, ___U.S. ___, 116 S. Ct. 1460 (1996). In *Carlisle*, this Court reiterated that district courts lack the power to develop rules that circumvent or conflict with federal rules or constitutional or statutory provisions. *Id.* at 1466 (citing *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 254-55 (1988)). Guided by the plain meaning of the time limitation in Federal Rule of Criminal Procedure 29(c), this Court refused to effectively nullify the Rule's 7-day filing limit by permitting a motion for acquittal to be filed a single day late. *Carlisle*, 116 S. Ct. at 1466. As this Court stated:

> "If 1-day late filings are acceptable, 10-day late filings might be equally acceptable, and so on in a cascade of exceptions that would engulf the rule erected by the filing deadline; yet regardless of where the cutoff line is set, some individuals will always fall just on the other side of it."

Id. at 1468 (quoting *United States* v. *Locke*, 471 U.S. 84, 101 (1985)).

This Court also rejected petitioner's argument that the rationale behind Fed. R. Crim. P. 29(c)'s time limit did not apply where the motion was filed only one day late. As the Court held, "[t]he only evident 'rationale' behind Rule 29(c)'s 7-day time limit is that a motion . . . filed eight days after trial is a motion filed one day later than justice and equity demand." *Id.* at 1468. When the Second Circuit condoned recertification so long as "the goal of § 1292(b) . . . will still be satisfied" (App. 10a), it relied on precisely the same reasoning that the Court flatly rejected in *Carlisle*. As this Court made clear in *Carlisle*, rules must be construed to mean what they plainly say. *Carlisle*, 116 S. Ct. at 1465. Thus, the Second Circuit's reasoning, which ventured beyond the plain

meaning of both 28 U.S.C. § 1292(b) and its implementing rules, was improper.

Even before *Carlisle*, however, this Court warned repeatedly against disregarding a statute's plain language. *See Connecticut National Bank*, 503 U.S. at 253-54; *United States* v. *Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241-42 (1989); *United States* v. *Goldenberg*, 168 U.S. 95, 102-03 (1897). Additionally, this Court has consistently refused to extend clear statutory time limitations. *See United States* v. *Locke*, 471 U.S. 84 (1985); *United States* v. *Boyle*, 469 U.S. 241 (1985).[20] Despite the clarity of the laws at issue, the circuit courts have fashioned their own rules, permitting recertification and effectively nullifying the unambiguous and jurisdictional 10-day time limit.[21] Without clarification from this Court, the express statutory time limitations established by

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[20] In strikingly parallel circumstances, this Court also has repeatedly held that the circuit courts are forbidden from granting rehearings or amending their orders solely for the purpose of extending the time to petition for certiorari. *See Missouri* v. *Jenkins*, 495 U.S. 33, 49 (1990)(citing *Wayne United Gas Co.* v. *Owens-Illinois Glass Co.* 300 U.S. 131, 137 (1937); *Conboy* v. *First National Bank*, 203 U.S. 141, 145 (1906); and *Credit Co.* v. *Arkansas Central Ry.*, 128 U.S. 258, 261 (1888)); *see also Federal Election Commission* v. *NRA Political Victory Fund*, 513 U.S. 88, 115 S. Ct. 537, 543 (1994) (Solicitor General may not authorize a filing after the fact to render it timely for certiorari petition).

[21] Notably, Congress considered and rejected an alternative 30-day time limitation, adopting instead the shorter 10-day period incorporated in section 1292(b). Whereas the initial drafts of the statute fixed the time limit at thirty days, the final proposal recommended by the Judicial Conference, which was essentially identical to the statute as later enacted by Congress, reduced the time limit to petition the circuit court to ten days. *See* Report of the Proceedings of the Regular Annual Meeting of the Judicial Conference of the United States 32 (1951) (thirty days); Report of the Proceedings of a Special Meeting of the Judicial Conference of the United States 203 (1952) (thirty days); Report of the Proceedings of the Regular Annual Meeting of the Judicial Conference of the United States 27 (1953) (ten days).

Congress will continue to be disregarded by the circuits and replaced with conflicting and inconsistent rules.

This case thus presents an important opportunity for this Court to resolve a mature and continuing split among the circuits, and to ensure that the plain meaning of both 28 U.S.C § 1292(b) and the implementing Federal Rules of Appellate Procedure will be correctly and uniformly applied.[22]

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[22] In light of the plain language of 28 U.S.C. § 1292(b), Federal Rules of Appellate Procedure 2, 5(a) and 26(b), and this Court's recent holding in *Carlisle* v. *United States*, petitioners respectfully submit that summary reversal under this Court's Rule 16 is warranted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: New York, New York
March 7, 1997

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term 1996

Motion Submitted: December 10, 1996

Decided: December 10, 1996

Opinion Filed: January 8, 1997

Docket No. 96-9132

MARISOL, A., by her next friend,
Rev. Dr. James Alexander Forbes, Jr., et al.,

Plaintiffs-Appellees,

—v.—

RUDOLPH W. GIULIANI, as Mayor of the
City of New York, et al.,

Defendants-Appellants.

Before:

FEINBERG, ALTIMARI and PARKER,
Circuit Judges.

Motion by plaintiffs-appellees to dismiss for lack of jurisdiction a pending interlocutory appeal from an order of the United States District Court for the Southern Dis-

trict of New York, Ward, J. The Second Circuit, Feinberg, J., held that the district court had the power to recertify under 28 U.S.C. § 1292(b) its original interlocutory order when defendants-appellants inadvertently failed to file a timely petition in this court for leave to appeal. Motion denied.

MARCIA ROBINSON LOWRY, Craig Levine, Rebecca Kim Kimura, Karen Freedman, Anne Park, Children Rights, Inc., New York, NY; Karen Freedman, Gayle Lerner, Lawyers for Children, New York, NY; Thomas F. Curnin, Landis Best, Serina Vash, Cahill Gordon & Reindel, New York, NY, *for Plaintiffs-Appellees*.

PAUL A. CROTTY, Corporation Counsel of the City of New York, New York, NY (Francis F. Caputo, Grace Goodman, Stephanie Freeman Goldstein, of Counsel), *for City Defendants-Appellants*.

DENNIS C. VACCO, Attorney General of the State of New York, New York, NY (Robert A. Forte, Michael S. Popkin, Steven M. Connolly, Assistant Attorneys General, of Counsel), Barbara G. Billet, Solicitor General, Thomas D. Hughes, Assistant Solicitor General, *for State Defendants-Appellants*.

FEINBERG, Circuit Judge:

In early September 1996, a panel of this court granted the petition of defendants-appellants under 28 U.S.C. § 1292(b) for permission to appeal from an interlocutory order of the United States District Court for the Southern District of New York, Robert J. Ward J. About 2-1/2 months later, plaintiffs-appellees moved to dismiss the appeal, claiming that this court had not had jurisdiction under § 1292(b) to grant defendants leave to appeal. This panel denied the motion by order dated December 10, 1996. In light of varying approaches in other circuits to the jurisdictional issues raised by plaintiffs' motion to dismiss the appeal, we write to explain our holding. The basic question raised by the motion was whether a district court has the power to recertify under § 1292(b) the order appealed from to enable the party opposing such order to file with this court a timely petition for leave to appeal. If not, then defendants' petition to us in this case was not timely and our prior panel did not have jurisdiction in September to grant it. We hold that a district court does have such power to recertify the order under attack. As a result, the prior panel did have jurisdiction to consider whether to exercise its discretion to grant defendants leave to appeal.[1]

Prior Proceedings

Plaintiffs, children who are the legal responsibility of the New York City child welfare system, brought an action under 42 U.S.C. § 1983 in the United States District Court for the Southern District of New York,

[1] We express no view on the prior panel's exercise of discretion in granting leave to appeal, but focus instead on the narrow jurisdictional argument of whether this court had the power to entertain defendants' petition at all.

against the Mayor of the City of New York, the Commissioner of the City's Department of Social Services, and the Commissioner of the City's Administration for Children's Services (collectively the City defendants), and the Governor of the State of New York, and the Acting Commissioner of the State Department of Social Services (collectively the State defendants). Plaintiffs allege that the New York City child welfare system has mishandled their cases and generally failed to protect their safety and well-being.

In July 1996, Judge Ward entered an order granting plaintiffs' motion to certify a class consisting of all children who are the legal responsibility of the City's child welfare system. On July 26, 1996, upon City defendants' motion,[2] the judge certified his class certification order for interlocutory appeal under 28 U.S.C. § 1292(b) (the first § 1292(b) order).[3] This started a 10-day period during which defendants could file a timely petition in this court seeking leave to appeal. See Federal Rules of Appellate Procedure (FRAP) 5(a).[4]

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[2] The parties later stipulated that the State defendants had joined the City's certification motion. However, this stipulation explicitly did not alter the amount of time defendants had to seek leave to appeal in this court.

[3] Section 1292(b) provides, in relevant part:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order . . . .

[4] FRAP 5(a) provides, in relevant part:

(footnote continued)

However, during a status conference before the district court on August 8, 1996, the City defendants disclosed that due to an inadvertent miscalculation of this 10-day period, they had failed to timely file their petition. Upon defendants' request and over plaintiffs' objection, the district judge on August 9 entered an order (the second § 1292(b) order), which recertified the class certification order. That is, he again stated in writing that he believed that the class certification order "involve[d] a controlling question of law as to which there is substantial ground for difference of opinion and . . . an immediate appeal may materially advance the ultimate termination of the litigation." At plaintiffs' request, the judge limited defendants to three business days in which to file their petition in this court rather than allowing them the full 10 days allotted by FRAP 5(a). On August 14, 1996, defendants filed their petition in this court for leave to appeal. With no discussion of the possible jurisdictional question, a panel of this court granted defendants leave to appeal by order dated September 3, 1996.

In mid-November, some three weeks after defendants filed briefs on the merits of the appeal, plaintiffs brought this motion to dismiss the appeal. They claimed that this court did not have jurisdiction to allow the appeal because defendants' petition in this court for leave to appeal was not filed within 10 days of the district court's first § 1292(b) order. As already indicated, we denied the motion to dismiss. This opinion explains why.

An appeal from an interlocutory order containing the statement prescribed by 28 U.S.C. § 1292(b) may be sought by filing a petition for permission to appeal with the clerk of the court of appeals within 10 days after the entry of such order in the district court . . . . An order may be amended to include the prescribed statement at any time, and permission to appeal may be sought within 10 days after entry of the order as amended.

Discussion

Section 1292(b), see note 3 above, states that after a district court certifies an interlocutory order for appeal, a circuit court may grant leave to appeal "if application is made to it within ten days after the entry of the order." The second sentence of FRAP 5(a), see note 4 above, makes clear that the 10-day period begins when the district court amends the order under attack to include the § 1292(b) certification. The parties agree that FRAP 26(b) prohibits a circuit court from extending this 10-day time limit. Plaintiffs correctly note that these rules constitute a jurisdictional limit on the circuit court's power to consider a petition for leave to appeal. *Tranello v. Frey*, 962 F.2d 244, 248 (2d Cir. 1992). Plaintiffs go on to argue that when Judge Ward entered the second § 1292(b) order after defendants had inadvertently failed to petition this court within 10 days after entry of the first § 1292(b) order, the district court enabled defendants to achieve an "end-run" around the jurisdictional limit.

Neither this circuit nor the Supreme Court has squarely addressed the issue of whether a circuit court has jurisdiction to consider a § 1292(b) petition in this situation.[5] Both parties cite *Baldwin County Welcome Center v. Brown*, 466 U.S. 147 (1984), in which the district court had recertified its original interlocutory order

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[5] In *Sperry Rand Corp. v. Bell Telephone Laboratories, Inc.*, 272 F.2d 29 (2d Cir. 1959) (in banc), an unusual in banc rehearing of the denial of a petition for leave to appeal under § 1292(b), this court considered a related problem. Although the case was decided before amendment of FRAP 5(a) to include its present language allowing district court certification under § 1292(b) of an order "at any time," we allowed a district court to include the § 1292(b) certification statement months after it had entered the order from which plaintiffs sought to appeal. *Id.* at 30.

nine months after the 10-day period had expired due to the appellant's failure to properly file its petition in the circuit court for leave to appeal. *Id.* at 159-60. The majority reached the merits of the appeal without even mentioning these facts. In dissent, however, Justice Stevens (joined by Justices Brennan and Marshall) noted a circuit split on the jurisdictional issue and explained that he was "persuaded by the view, supported by the commentators, that interlocutory appeals in these circumstances should be permitted, notwithstanding the fact that this view essentially renders the 10-day time limitation, if not a nullity, essentially within the discretion of a district court to extend at will." *Id.* at 162 (Stevens, J., dissenting). Although defendants cite *Baldwin* as implicit support for the district court's power to recertify an order, the issue bears further exploration in view of the majority's silence on the issue.

In support of plaintiffs' position, at least one circuit has held that a district court cannot recertify an interlocutory order solely to "extend the jurisdictional period of time which the petitioner had permitted to elapse." *Woods v. Baltimore and Ohio R.R.*, 441 F.2d 407, 408 (6th Cir. 1971) (*per curiam*) (recertification six months after original certification did not give appellate court jurisdiction). That court reasoned that the district court should not be able to do indirectly what the circuit court could not do. *Id.* Relying on *Woods*, a district court in this circuit has held that, even assuming appellants were not at fault for failing to timely petition for appeal, the court was "powerless" to recertify the interlocutory order solely to restart the 10-day period. *Nakhleh v. Chemical Constr. Corp.*, 366 F. Supp. 1221, 1223 (S.D.N.Y. 1973).

In contrast, the Fifth Circuit has held (in an opinion by Judge Alvin R. Rubin) that a district court may freely recertify an interlocutory order as long as the requirements for certification under § 1292(b)—a controlling question of law as to which there is substantial ground for difference of opinion and immediate appeal may materially advance the ultimate termination of the litigation—continue to exist when the would-be appellant seeks recertification. *Aparicio v. Swan Lake*, 643 F.2d 1109, 1110-1113 (5th Cir. 1981); *see Aucoin v. Matador Servs. Inc.*, 749 F.2d 1180, 1181 (5th Cir. 1985); Wright, Miller & Cooper, Federal Practice and Procedure, Jurisdiction & Related Matters 2d. § 3929 at 395 (describing this as the "better view"); *see also Rodriguez v. Banco Central, et al.*, 917 F.2d 664, 669 (1st Cir. 1990) (implying that district court could recertify order to enable negligent appellant to file petition); *In re La Providencia Dev. Corp.*, 515 F.2d 94 (1st Cir. 1975) (same).

In *Aparicio*, the Fifth Circuit considered the argument that allowing recertification when a year had elapsed after the district court's original certification order would vitiate § 1292(b)'s purpose of ensuring prompt disposition of interlocutory appeals. The court rejected this view because FRAP 5(a) allows a district court to amend "at any time" the order from which an appeal is to be taken, in order to add the certification provision, and the district court retains the power to reconsider its interlocutory orders until it enters final judgment. Therefore, the *Aparicio* court reasoned, an extended delay can occur between the entry and appeal of the interlocutory order under attack. *Id.* at 1111-12. More importantly, "[a] contrary interpretation of the statute would preclude an interlocutory appeal under circumstances in which the criteria of the statute are satisfied and both the district

court and [circuit] court have concluded that an interlocutory appeal is appropriate." *Id.* at 1112.

With deference, we regard the Sixth Circuit's approach in *Woods* as unnecessarily rigid. The Fifth Circuit's observations in *Aparicio* are persuasive. However, the Ninth Circuit has noted that the Fifth Circuit's approach on its face goes "too far in the other direction" because it "effectively eliminate[s] the ten-day jurisdictional limit completely by allowing apparently uncontrolled and repeated recertifications." *In re Benny*, 812 F.2d 1133, 1137 (9th Cir. 1987). The Ninth Circuit instead "elected to take the middle road adopted by the Seventh Circuit," by which a court of appeals may exercise jurisdiction over a petition to appeal from a recertified interlocutory order if "jurisdiction over the appeal would serve judicial efficiency" and thus " 'advances the purposes of section 1292(b).' " *Id.* at 1137 (citing *Nuclear Engineering Co. v. Scott*, 660 F.2d 241, 247 (7th Cir. 1981)). To facilitate this inquiry, the court in *Nuclear Engineering* focused on "all events transpiring between the entry of certification orders that bear upon the utility of a section 1292(b) appeal." *Id.*; *but see Weir v. Propst*, 915 F.2d 283, 286 (7th Cir. 1990) (describing in dicta the Ninth and Seventh Circuits' approach as "controversial").

Although we agree with Justice Stevens that the issue thus posed is "a close one," *Baldwin*, 466 U.S. at 162, we believe that the appropriate approach is that taken by the Ninth Circuit. As we understand it, that would allow a circuit court to accept an appeal in the situation we have here after considering a number of factors, including the length of the delay between the end of the original 10-day period and recertification of the order, the reasons given for failing to timely file in the circuit

court, and any prejudice to the appellee from the delay. *Benny*, 812 F.2d at 1137; *Nuclear Engineering*, 660 F.2d at 247-48; *see also Myles v. Laffitte*, 881 F.2d 125, 126 n.2 (4th Cir. 1989) (suggesting in dicta evaluation of same factors). The Third Circuit advocated a somewhat similar approach in *Braden v. University of Pittsburgh*, 552 F.2d 948 (3d Cir. 1977) (en banc), holding that a district court may recertify an order—and thus restart the 10-day period—when the appellant's failure to timely file was caused by a mistake of the court, rather than the party's own negligence. *Id.* at 955 (considering fault for and extent of delay and prejudice to appellee). The focus of this inquiry, however, should be on ensuring that the goal of § 1292(b)—resolution of a controlling legal question that could advance the ultimate termination of the litigation—will still be satisfied by allowing an interlocutory appeal.

Plaintiffs argue that even under this standard, we should not permit recertification here because defendants' failure to petition within the original 10-day period was due solely to their own negligence. Compare *Nuclear Engineering*, 660 F.2d at 248 (recertification allowed when district court "somewhat encouraged" appellants' legal misunderstanding), and *Braden*, 552 F.2d at 955 (same when delay due to "dereliction" of the district court), with *Woods*, 441 F.2d at 408 (no recertification when appellant "discovered" own error in failing to timely petition). Plaintiffs contend that we should be especially unforgiving when a "seasoned" litigant such as a governmental unit commits the negligence. *Cf. Baldwin*, 466 U.S. at 148 (negligent petitioner was pro se litigant).

We reject the contention that an appellant's negligence completely strips the district court of discretion to recer-

tify an interlocutory order. City defendants have candidly admitted from the outset that their failure to timely petition this court resulted from their miscalculation of the 10-day period. While we do not condone carelessness, we weigh the defendants' fault as but one factor—albeit a significant one—in our determination of whether district court recertification in this case serves the goals of § 1292(b).

The other factors appear to favor allowing defendants' appeal. Most significantly, the district court emphasized in entering the second § 1292(b) order that it still felt "constrained to grant the City defendants' application to certify this matter" because the certified issue—whether class certification was proper—was a controlling one, the prompt resolution of which could materially advance the ultimate termination of the litigation. Also, defendants moved for recertification in the district court just three days after the lapse of the original 10-day period, and promptly filed their petition in this court for leave to appeal, less than one week later. *See, e.g.* Wright, Miller & Cooper § 3929 at 397 ("Renewed certification may prove easiest if the ten-day period was barely missed."). Finally, plaintiffs do not suggest that recertification prejudiced them in any way. *See Nuclear Engineering*, 660 F.2d at 248. Indeed, defendants argue that plaintiffs waived their objections to recertification of the order because, after plaintiffs' initial objection in the district court, they failed to either raise this issue before the panel of this court that in early September 1996 granted defendants' petition for leave to appeal or move for reargument before that panel. While not determinative, plaintiffs' tardiness in raising this jurisdictional challenge reinforces defendants' argument that plaintiffs were not prejudiced by recertification in this case.

Balancing all of these considerations, we denied plaintiffs' motion to dismiss.

Although we hold that recertification was proper in this case, we caution that "[t]he power to renew the certification should be used carefully to prevent misuse of interlocutory appeals for the purpose or with the effect of harassing an adversary or fostering delay." Wright, Miller & Cooper, § 3929 at 397. District and circuit courts can prevent potential abuse of recertification by carefully evaluating all circumstances surrounding the recertification request as they relate to the ultimate efficiency goals of § 1292(b). *See Aparicio*, 643 F.2d at 1112-13. As discussed above, these goals are served here.

Motion denied.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 96-9132 & 96-9134
Filed: November 18, 1996

MARISOL A.

—v.—

GIULIANI

NOTICE OF MOTION FOR ORDER TO DISMISS DEFENDANTS-APPELLANTS' APPEALS PURSUANT TO 1292(b)

MOTION BY:

MARCIA ROBINSON LOWRY
CHILDREN'S RIGHTS INC.
404 Park Ave. South
New York, NY 10016

OPPOSING COUNSEL:

STEPHANIE FREEMAN GOLDSTEIN
Assistant Corporation Counsel
Appeals Division
New York City Law Department
100 Church Street, Room 6-187
New York, NY 10007

MICHAEL S. POPKIN, ESQ.
Assistant Attorney General
New York State Attorney General's Office
120 Broadway
New York, NY

Has consent of opposing counsel:

A. been sought?	☐ Yes	☒ No
B. been obtained?	☐ Yes	☒ No
Has service been effected?	☒ Yes	☐ No
Is oral argument desired? *(Substantive motions only)*	☐ Yes	☒ No

Requested return date:
(See Second Circuit Rule 27(b))

Has argument date of appeal been set:

A. by scheduling order?	☐ Yes	☒ No
B. by firm date of argument notice?	☐ Yes	☒ No

C. If Yes, enter date:

Judge or agency whose order is being appealed:
Hon. Robert J. Ward

Brief Statement of the relief requested:
Plaintiffs-appellees move to dismiss defendants-appellants' interlocutory appeals as untimely, pursuant to Fed. R. App. P. 5(a) and 26(b).

By: /s/ CRAIG LEVINE, ESQ.
Craig Levine, Esq.

Appearing for:

Marisol A. et. al.

Appellant or Petitioner:
☐ Plaintiff ☐ Defendant
Appellee or Respondent:
☒ Plaintiff ☐ Defendant

November 18, 1996

ORDER

Before:

FEINBERG, ALTIMARI and PARKER,
Circuit Judges.

IT IS HEREBY ORDERED that the motion be and it hereby is denied.

FOR THE COURT

GEORGE LANGE III, Clerk

By: /s/ ARTHUR HELLER
Arthur Heller,
Administrative Attorney

Date: December 10, 1996

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 96-8036 & 96-9132
95 Civ. 10533 (RJW)
Filed: August 14, 1996

MARISOL A., *et al.*,

Plaintiffs-Respondents,

—v.—

RUDOLPH GIULIANI, *et al.*,

Defendants-Petitioners.

NOTICE OF MOTION FOR LEAVE TO
APPEAL PURSUANT TO 28 USC SEC. 1292(b)

MOTION BY:

GRACE GOODMAN
NYC Law Dept.
attorney for Defendants
Giuliani, Hammons, Scopetta
100 Church Street
New York, NY 10007
(212) 788-0963

OPPOSING COUNSEL:

MARCIA ROBINSON LOWRY
CHILDREN'S RIGHTS, INC.,
Attorney for Plaintiffs
404 Park Avenue South
New York, NY 11016
(212) 683-2210

Has consent of opposing counsel:

A. been sought?	☒ Yes	☐ No
B. been obtained?	☐ Yes	☒ No

Has service been effected?	☒ Yes	☐ No
Is oral argument desired? *(Substantive motions only)*	☐ Yes	☒ No

Requested return date: N/A
(See Second Circuit Rule 27(b))

Has argument date of appeal been set:

A. by scheduling order?	☐ Yes	☐ No
B. by firm date of argument notice?	☐ Yes	☐ No

C. If Yes, enter date:

Judge or agency whose order is being appealed:
Robert J. Ward, USDJ

Brief Statement of the relief requested:
Permission to appeal pursuant to 28 USC Sec. 1292(b) from an order of the District Court entered July 5, 1996, as modified by order dated August 9, 1996.

By: /s/ GRACE GOODMAN
Grace Goodman

Appearing for:

Administration for Children's Services

Appellant or Petitioner:
☐ Plaintiff ☒ Defendant
Appellee or Respondent:
☐ Plaintiff ☐ Defendant

August 9, 1996

ORDER

Before:

MCLAUGHLIN, JACOBS, *Circuit Judges*,
and KELLEHER, *District Judge*.

IT IS HEREBY ORDERED that the motion be and it hereby is GRANTED.

George Lange III, Clerk

By: /s/ ARTHUR HELLER
Arthur Heller,
Administrative Attorney

Date: September 3, 1996

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Filed: August 9, 1996
95 Civ. 10533 (RJW)

MARISOL A., et al.,

Plaintiffs,

—v.—

RUDOLPH W. GIULIANI, Mayor of the City of New York, et al.,

Defendants.

MEMORANDUM AND ORDER

On June 18, 1996, this Court granted plaintiffs' motion pursuant to Rule 23, Fed. R. Civ. P., for class certification and, on July 3, 1996, signed an order to that effect. The City defendants then asked this Court to certify that decision for immediate appeal pursuant to 28 U.S.C. § 1292(b). The State defendants did not indicate at that time that they joined in the application.

On July 26, 1996, this Court signed an order certifying the matter for interlocutory review. After being advised that the State defendants intended to join in the application, this Court, on August 7, 1996, approved a stipulation so doing. Because defendants failed to file a petition for permission to appeal with the clerk of the court of appeals within the ten day period required by Rule 5(a), Fed. R. App. P., they now ask this Court again to exercise its discretion to certify this matter for appellate consideration.

Despite a strong belief that certification of the instant class pursuant to Rule 23, Fed. R. Civ. P., was proper, this Court nevertheless feels constrained to grant defendants' application to certify this matter since it involves a controlling question of law as to which there is substantial ground for difference of opinion and because an immediate appeal may materially advance the ultimate termination of the litigation.

For the foregoing reasons, defendants' application pursuant to 28 U.S.C. § 1292(b) for certification for interlocutory appeal of this Court's order certifying this case as a class action is granted. Upon their consent, defendants are directed to file their petition for permission to appeal with the clerk of the court of appeals within three business days from the date of this order.

It is so ordered.

Dated: New York, New York
August 9, 1996

/s/ ROBERT J. WARD
Robert J. Ward, U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

August 8, 1996
95 Civ. 10533 (RJW)

MARISOL A., by her next friend, Rev. Dr. James Alexander Forbes, Jr.; LAWRENCE B., by his next friend, Prof. Mitchell I. Ginsberg; THOMAS C., by his next friend, Dr. Margaret T. McHugh; SHAUNA D., by her next friend, Prof. Kathryn Conroy; OZZIE E., by his next friends, Jill Chaifetz and Kim Hawkins; DARREN F. and DAVID F., by their next friends, Juan A. Figueroa and Rev. Marvin J. Owens; BILL G. and VICTORIA G., by their next friend, Sister Dolores Gartanutti; BRANDON H., by his next friend, Thomas J. Moloney; and STEVEN I., by his next friend, Kevin Ryan, on their own behalf and on behalf of all others similarly situated,

Plaintiffs,

—v.—

RUDOLPH W. GIULIANI, Mayor of the City of New York; MARVA LIVINGSTON HAMMONS, Administrator of the Human Resources Administration and Commissioner of the Department of Social Services of the City of New York; NICHOLAS SCOPPETTA, Commissioner of the New York City Administration for Children's Services; GEORGE E. PATAKI, Governor of the State of New York; and BRIAN J. WING, Acting Commissioner of the Department of Social Services of the State of New York,

Defendants.

August 8, 1996
2:10 p.m.

Before:

HON. ROBERT J. WARD,
District Judge

APPEARANCES

CAHILL, GORDON & REINDEL
Attorneys for Plaintiffs
BY: THOMAS CURNIN

CHILDREN'S RIGHTS, INC.
Attorneys for Plaintiffs
BY: MARCIA ROBINSON LOWRY
CRAIG LEVINE

PAUL A. CROTTY
Corporation Counsel for the
City of New York
BY: GRACE GOODMAN
PHILLIS SEIDMAN
Assistant Corporation Counsels

ADMINISTRATOR FOR CHILDREN'S SERVICES
Attorneys for Defendants
BY: GERALD HARRIS

DENNIS C. VACCO
Attorney General for the State of New York
BY: STEVEN M. CONNOLLY
Assistant Attorney General

Conference

(In open court)

THE COURT: I have received some letters which indicate that the parties believe they have reached an impasse, and I have been asked in those letters to conduct this conference

to discuss the matters that are open and to attempt to reach a result. The letters set forth the positions of the parties, and I have some thoughts as to where we go from here, but before expressing them, I would like to hear briefly from the attorneys, starting with plaintiff's counsel and continuing on with the City and State.

* * * * *

MS. GOODMAN: Thank you, your Honor. I too would be very interested in the court's suggestions as to how we should proceed. I was, as I wrote to you, a little upset at the nature of the plaintiff's letter, which it seems to me went into details about things that we had agreed not to go into details about. So I'm not going to go into those details at this point.

I must say we do believe that a stay of the class wide discovery is appropriate and efficient at this time, particularly in light of this court's certification of the issue of class action for interlocutory appeal to the Second Circuit.

In connection with that, I have a further application to make today. I am embarrassed to report that I have discovered that the Second Circuit counts time differently than the district courts. The district court rules, as you know, say that in periods prescribed by statute that are 11 days or less don't count weekends or holidays, and I was going on that basis when I was counting our time to submit our petition to the Second Circuit. But I discovered yesterday, as I was preparing to serve today, that in fact they only omit weekends when the period is 7 days or less, which means our time had run already. However, I have done some research, and I discovered that there is a Supreme Court comment, I think it's probably dicta in the case, but it's still a strong discussion and several other circuits who have held that there is a way out of this dilemma, and the Second Circuit, so far as I can see, has not held to the contrary, although it hasn't ruled on it, and that way is that if this court would see fit to recertify this issue for interlocutory appeal, that would start the 10 days running

again, and we would promptly file our petition, which is about ready to go.

Therefore, I make application right now to your Honor to do such a recertification, which I submit would also be appropriate in light of the fact that there seems to have been some confusion over the role of the State defendants in seeking this appeal, and they very much want to join in the request for certification. And the request for appeal and your previous certification order suggested that they were not bringing it, and this would be an opportunity to correct this application and issue a new and proper order that would not delay anything more than a couple of days. I would appreciate your doing that. If you are interested, I do have a form of order exactly like the one you just signed but with the matter the State corrected, which I would be happy to share with counsel and with the court, if it's useful.

I don't know if you want to comment on that before we go any further.

THE COURT: Why don't you show it to Ms. Lowry, and we will see what her comments are. She was most helpful in agreeing to the stipulation with the State defendants, and she knows, in general, my desire that the Court of Appeals have a chance to determine A, whether to take this particular certification and accept the appeal or not on the merits. I think the word that Ms. Lowry used when I had a brief discussion with her about working out something with the State is that she did not wish to rely on technicalities in dealing with the certification with respect to the State, and she followed through on that by agreeing to the stipulation, which I so ordered the other day.

Ms. Lowry.

MS. LOWRY: Well, your Honor, on this issue, I must say, as the court is aware, I was happy to agree to this problem with the State. But your Honor, frankly, either this is a lawsuit or this is not a lawsuit.

It is quite clear from everything that's happened, and certainly from the standpoint of the City, that the City doesn't want there to be a lawsuit. I understand, but it's too bad. There is a lawsuit, and there is a lawsuit because of very, very serious factual problems here and serious legal issues.

So your Honor, at this point, I must say we believe that an awful lot of what's going on has to do with delaying this case, and I don't speculate on the reasons for delay, but some of them are pretty obvious. We in fact now object to this, because I was not allowing the State to join in on it and in any way slow this down, and I was not trying to do anything to stop it.

At this point, your Honor, there are rules. One of the purposes of this rule is to make things move more quickly.

We, in fact, had also figured out that these papers were due August 5th. I don't believe they should get another 10 days. I believe that they did not act responsibly here in terms of prosecuting this appeal, because they don't have any need to rush, and they should not be granted the opportunity to cure this error. As you know, your Honor, on the substance, we don't think this matter should be certified, because we think the court was correct.

The only reason we didn't want it to be certified, because we expected the City to take the position they now have taken, which is since you certified the appeal, let's slow down this case and see whether or not the Circuit is going to take it, and then certainly if the Circuit takes it, then surely there should be no class wide discovery.

Your Honor, our plaintiffs, I know the court is aware of this, but I must say our plaintiffs are children. They are at substantial risk. This case has got to proceed expeditiously, and this is just a further delay.

I would urge the court not to do this.

MS. GOODMAN: I would submit that this will not delay matters more than a few days. It won't take the full 10 days to file the petitions, which is ready to go except for changing the order.

As for the children, we believe that we are in fact engaged in a serious effort at this point to correct any deficiencies that existed in the past, and we're working at it as fast and as hard as we can. And yes, it would be disruptive to have to turn back, as we have mentioned several times, to be looking into the deep past at a time when we're trying very hard to look into the future. We're not doing this for the sake of delay. We're doing this in order to get on with the task that has been entrusted to us, and we need to get on with it.

I do believe that the Supreme Court has in fact dealt with the question in the case of *Baldwin County Welcome Center v. Brown*, which is 466 U.S. 147, a 1984 case on page 162, Justice Stevens states, "I concur in the majority's holding that there is jurisdiction."

There is a case like this where an order was recertified and then brought to interlocutory appeal. He says, "I am presently persuaded by the view supported by the commentators that interlocutory appeals in these circumstances should be permitted, notwithstanding the fact that this view essentially renders the 10 day time limitation if not a nullity, essentially within the discretion of the district court to extend at will."

In that case, the recertification was nine months after the first one had lapsed. We're only asking for the two days after the first one lapsed, and I would again press on the court to sign a new certification order, the one I proposed or a different one, as soon as possible.

Would you like me to hand this one up?

THE COURT: Would you?

Is it your position that the original memorandum and order is now a nullity?

MS. GOODMAN: The July 26th certification, I think it may be that—I'm not sure if it's a nullity, but I know that a new one would supersede it. Now, I do believe it should contain language saying that. Obviously, we can add that.

THE COURT: Why don't we put this to the side for the moment and deal with the matter of how to go forward with

this case, regardless of whether there is an interlocutory appeal or not, because I had in mind proceeding along two parallel tracks.

On one track you have the appellate process proceeding.

On the other track we have the case proceeding.

I have some thoughts on that, which I intended to express this afternoon. It may be that when we reach this question, the matter of how the case is going to proceed, we can resolve the matter that has just been raised.

At this point, I'm going to put the proposed order off to the side and focus our attention on moving this case forward and attempting to look at the whole picture.

* * * * *

MS. GOODMAN: The question I raised at the beginning of my remarks is still outstanding. Do you want to give us an answer now?

THE COURT: Yes, I will give you an answer now.

Ms. Lowry, Mr. Curnin, do you want to be heard further on the matter discussed at the outset?

MS. LOWRY: Your Honor, obviously our concern is that discovery proceed and it is going to proceed. The only thing that I would ask though, because it is still hanging over our heads, is that the City be instructed not to take the full ten days and that there be a commitment that instead of having this run again from now and an additional ten days, that they be required to submit their papers, even though they technically have the ten days, that they submit it in a shorter time.

MS. GOODMAN: I don't think that's a problem.

MS. LOWRY: I would like to make it specific. I would like to have some agreement now.

THE COURT: Let's do the following, do you have a problem with their order? It was my disposition that if I were to

grant their application, I would draft up my own order which will take a day or so.

MS. GOODMAN: Or amended perhaps or something like that, because it amends to add the State.

THE COURT: We will draft our own, and I ask Ms. Goodman if you could serve the papers within three business days of being notified that we have prepared and signed an order and that of course will be available to you. I'm thinking that this is Friday, and I don't get to it I don't want to make it just three days. This should be accomplished so that the papers will be served one day in the early or mid part of next week, the way I perceive it. Would that be agreeable?

In other words, we will draft or redraft the order to try and touch all the bases. I would sign it. I would notify both counsel if it were tomorrow or at the latest Monday that it had been done, and then I would ask that the papers, which are ready anyway, be served personally within three business days.

MS. GOODMAN: That's fine.

MS. LOWRY: Fine, your Honor.

THE COURT: Anything further?

MR. CURNIN: Just one comment, your Honor, if I may in regard to the City's application here, which I consider to be a serious matter.

I think as a matter of professional notice, we should be advised if not in writing, we should certainly be given some notice that applications of that type are to be made and that we don't hear about them for the first time when we're sitting in court on a status call in regard to discovery.

THE COURT: I agree that the appropriate course when something comes up that will require an application to the court is to give some reasonable prior notice to the other side so they may be prepared to respond. I don't believe that sit-

uation will occur again. So I'm going to leave the matter right there.

Anything further?

MS. LOWRY: No, your Honor.

MS. GOODMAN: No, your Honor.

THE COURT: Thank you.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Filed: August 7, 1996
95 Civ. 10533 (RJW)

MARISOL A. , *et al.*,

Plaintiffs,

—v.—

RUDOLPH W. GIULIANI,
Mayor of the City of New York, *et al.*,

Defendants.

STIPULATION

The parties to this action, by and through the undersigned counsel, agree that the State Defendants are deemed to have joined in the City Defendants' application to certify the Court's order, dated July 3, 1996 (granting plaintiffs' motion for class certification) for immediate appeal pursuant to 28 U.S.C. § 1292(b); and that the State Defendants shall have leave, along with the City Defendants, to pursue said interlocutory appeal, under the terms of the Court's Order, dated July 26, 1996, granting the City Defendants' application. The State Defendants participation in that Order shall be *nunc pro tunc*, and no deadline established by the Court's July 26, 1996 Order shall be extended by virtue of this stipulation.

Dated: New York, New York
August 5, 1996

PAUL A. CROTTY
Corporation Counsel of the
City of New York
100 Church Street
New York, NY 10007

Attorney for City Defendants

By:

/s/ GRACE GOODMAN
Grace Goodman
Assistant Corporation Counsel

DENNIS C. VACCO
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State of New York
120 Broadway–24th Floor
New York, NY 10007

Attorney for State Defendants

By:

/s/ MICHAEL S. POPKIN
Michael S. Popkin
Assistant Attorney General

MARCIA ROBINSON LOWRY
Children's Rights Inc.
404 Park Avenue South
New York, NY 10016

Attorneys for Plaintiffs

/s/ MARCIA ROBINSON LOWRY
Marcia Robinson Lowry, Esq.

SO ORDERED:
8/7/96

/s/ ROBERT J. WARD
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Filed: July 26, 1996
95 Civ. 10533 (RJW)

MARISOL A., et al.,

Plaintiffs,

—v.—

RUDOLPH W. GIULIANI,
Mayor of the City of New York, et al.,

Defendants.

MEMORANDUM AND ORDER

On June 18, 1996, this Court granted plaintiffs' motion pursuant to Rule 23, Fed. R. Civ. P., for class certification and, July 3, 1996, signed an order to that effect. The City defendants now ask this Court to certify this decision for immediate appeal pursuant to 28 U.S.C. § 1292(b). The State defendants do not join in the application.

Despite a strong belief that certification of the instant class was proper, this Court nevertheless feels constrained to grant the City defendants' application to certify this matter since it involves a controlling question of law as to which there is substantial ground for difference of opinion and because an

immediate appeal may materially advance the ultimate termination of litigation.

For the foregoing reasons, the City defendants' application pursuant to 28 U.S.C. § 1292(b) for certification for interlocutory appeal of this Court's order certifying this case as a class action is granted.

It is so ordered.

Dated: New York, New York
July 26, 1996

/s/ ROBERT J. WARD
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Filed: July 3, 1996
95 Civ. 10533 (RJW)

MARISOL A., by her next friend,
Rev. Dr. James Alexander Forbes, Jr., *et al.*,

Plaintiffs,

—v.—

RUDOLPH W. GIULIANI,
Mayor of the City of New York, *et al.*,

Defendants.

ORDER

This matter having come on to be heard on City and State defendants' motions to dismiss, that the court decline to exercise its supplemental jurisdiction, that plaintiffs' state law claims be deemed nonjusticiable, and that the court abstain; City defendants' motion to bifurcate the proceedings; and plaintiffs' motion for class certification on March 4, 1996, and upon all the previously submitted briefing in support of and opposition to these motions, and in accordance with this court's opinion of June 18, 1996, it is hereby ordered, adjudged and decreed as follows:

1. Defendants' motions to dismiss plaintiffs' federal constitutional claims are resolved thus:

(a) Custodial plaintiffs may pursue their Fourteenth Amendment, substantive due process claims based on alleged violations of their right to be free from harm, which right includes, but is not necessarily limited to, the right to adequate food, shelter, clothing, medical care and reasonable safety; the right to safe conditions of confinement; the right to be free from physical injury; the right to be free from unreasonable and unnecessary intrusions into their emotional well-being; the right to conditions of confinement that bear a reasonable relationship to the custodial purpose of foster care; the right to appropriate conditions and duration of foster care; and the right to reasonable services and placements to reunite them with their biological families, when appropriate;

(b) Custodial plaintiffs' claims to least restrictive, optimal placements are dismissed;

(c) Custodial plaintiffs' claims of a First and/or Ninth Amendment right to associate with their biological family members are dismissed;

(d) All plaintiffs may pursue their Fourteenth Amendment procedural due process claims grounded in New York State's Child Protective Services Laws (N.Y. Soc. Serv. Law, Art. 6, Title 6); and

(e) Defendants' motions to dismiss plaintiffs' Fourteenth Amendment procedural due process claims grounded in any state law or regulation other than New York State's Child Protective Services Laws (N.Y. Soc. Serv. Law, Art. 6, Title 6) are denied.

2. Defendants' motions to dismiss plaintiffs' federal statutory claims—including claims under the Adoption Assistance and Child Welfare Act (including the Multiethnic Placement Act), the Child Abuse Prevention and Treatment Act, the Americans With Disabilities Act and the Rehabilitation Act of 1973—are denied.

3. Defendants' motions that the court decline to exercise its supplemental jurisdiction over plaintiffs' state law claims are denied, and the court hereby exercises its supplemental jurisdiction over plaintiffs' state law claims.

4. Defendants' motions that plaintiffs' state law claims be deemed nonjusticiable are denied.

5. Defendants' motions that the court abstain are denied.

6. City defendants' motion to bifurcate the proceedings in this matter into two phases is denied.

7. Plaintiffs' motion for class certification is granted, and the following class is hereby certified:

> All children who are or will be in the custody of the New York City Administration for Children's Services ("ACS"), and those children who, while not in the custody of ACS, are or will be at risk of neglect or abuse and whose status is or should be known to ACS.

SO ORDERED

Dated: July 3, 1996
New York, New York

/s/ _____
The Honorable Robert J. Ward
U.S.D.J.

Prepared for entry by:

/s/ CRAIG LEVINE
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Judicial Code

28 U.S.C. § 1292. Interlocutory decisions

* * *

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

Federal Rules of Appellate Procedure

Rule 2. Suspension of Rules

In the interest of expediting decision, or for other good cause shown, a court of appeals may, except as otherwise provided in Rule 26(b), suspend the requirements or provisions of any of these rules in a particular case on application of a party or on its own motion and may order proceedings in accordance with its direction.

* * *

Rule 5. Appeals by Permission Under 28 U.S.C. § 1292(b)

(a) Petition for Permission to Appeal. An appeal from an interlocutory order containing the statement prescribed by 28 U.S.C. § 1292(b) may be sought by filing a petition for permission to appeal with the clerk of the court of appeals within 10 days after the entry of such order in the district court with proof of service on all other parties to the action in the district

court. An order may be amended to include the prescribed statement at any time, and permission to appeal may be sought within 10 days after entry of the order as amended.

* * *

Rule 26. Computation and Extension of Time

* * *

(b) Enlargement of Time. The court for good cause shown may upon motion enlarge the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of such time; but the court may not enlarge the time for filing a notice of appeal, a petition for allowance, or a petition for permission to appeal. Nor may the court enlarge the time prescribed by law for filing a petition to enjoin, set aside, suspend, modify, enforce or otherwise review, or a notice of appeal from, an order of an administrative agency, board, commission or officer of the United States, except as specifically authorized by law.

* * *

(2)

Supreme Court, U.S.
FILED
APR 9 1997
OFFICE OF THE CLERK

No. 96-1424

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1996

MARISOL A., by her next friend
Rev. Dr. James Alexander Forbes, Jr., *et al.*,

Petitioners,

- v. -

RUDOLPH W. GIULIANI, as Mayor of the
City of New York, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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~ 26 pp

COUNTER-QUESTION PRESENTED

Whether the District Court abused its discretion in recertifying the controlling question of law pursuant to 28 U.S.C. § 1292(b), which it had certified for interlocutory appeal in a prior order, to enable defendants to file a timely petition for leave to appeal in the Court of Appeals.

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STATEMENT OF THE CASE

A. District Court Proceedings

Plaintiffs, eleven minor children, are residents of New York City who, through their "next friends," have sued, inter alia, the Mayor of the City of New York and the Commissioner of the City's Administration for Children's Services (ACS), successor to the Child Welfare Administration (CWA)[1] ("City defendants"), as well as the Governor of the State of New York and the Commissioner of the State's Department of Social Services (SDSS) ("State defendants"), claiming that they have been deprived of vested rights which they enjoy in the operation of New York City's child welfare system. They allege multiple deprivations of their civil rights, purportedly due to the systemic failure of the entire New York City child welfare system. The complaint, inter alia, purports to identify seven discrete and widely disparate questions of fact at issue in this lawsuit (which plaintiffs characterize as "common," though in actuality they touch upon virtually every facet of ACS's operations), three "common" questions of law in the form of reciting the multiple statutory bases on which this lawsuit is predicated, and, in conclusory fashion, asserts that "[t]he legal violations alleged by the named plaintiffs are typical of those raised by the claims of each and every member of the putative class. The harms suffered by the named

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[1] In or about February, 1996, the functions of the former Child Welfare Administration, a part of the Human Resources Administration, were reconstituted into a new agency called the Administration for Children's Services, and a new commissioner was appointed. In the interest of consistency, this brief will refer to ACS throughout.

plaintiffs are typical of the harms suffered by all children similarly situated" (A26-28).[2]

For their relief, plaintiffs seek, inter alia, "declaratory and injunctive relief necessary and appropriate to remedy the defendants' violations of the plaintiffs' rights," and for the Court to "[a]ppoint a receiver with full authority to oversee and direct the implementation of all of the injunctive relief granted by the court, to restructure the New York City child welfare system, and to take all steps necessary to ensure that the child welfare system operates in full compliance with all applicable law" (A126-127).

By notice of motion dated December 14, 1995, plaintiffs moved for an order for class certification upon the basis of the complaint (A129). Both the State and City defendants opposed the motion.

By opinion dated June 18, 1996 (A559-624), the District Court (Ward, J.), inter alia, granted plaintiffs' motion for class certification and adopted, without further refinement, the exact class definition set forth by plaintiffs in both their complaint and their motion papers. 929 F. Supp. 662 (S.D.N.Y. 1996). By order dated July 3, 1996, Judge Ward (Ward, J.) entered an order effecting his opinion granting class certification, certifying the class as follows (App. 36a):[3]

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[2] Numbers in parentheses preceded by the letter "A" refer to pages in the Joint Appendix filed in the United States Court of Appeals for the Second Circuit, on the pending interlocutory appeal from the District Court's order granting class certification.

[3] Consistent with plaintiffs' references, numbers in parentheses (continued...)

> All children who are or will be in the custody of the New York City Administration for Children's Services ("ACS"), and those children who, while not in the custody of ACS, are or will be at risk of neglect or abuse and whose status is or should be known to ACS.

By memorandum and order dated July 26, 1996, Judge Ward granted the City defendants' request to certify that portion of the July 3, 1996 order relating to class certification for interlocutory appeal, pursuant to 28 U.S.C. § 1292(b) (App. 32a-33a). The District Court opined that it was constrained to grant the City defendants' motion for § 1292(b) certification, since the matter "involves a controlling question of law as to which there is substantial ground for difference of opinion and because an immediate appeal may materially advance the ultimate termination of the litigation" (App. 32a-33a).

Because the State defendants did not indicate at that time that they wished to appeal any part of the July 3, 1996 order, the July 26, 1996 order applied only to the City defendants. By a stipulation that was "so ordered" by the District Court on August 7, 1996 (the "stipulation"), the parties consented to permit the State defendants to join in the City defendants' application for certification for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) (App. 30a-31a). The parties stipulated that the State defendants' participation in the July 26, 1996 order was nunc pro tunc, and that the stipulation

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3 (...continued)
preceded by "App." refer to the Appendix to the Petition for Writ of Certiorari filed by plaintiffs.

did not extend any deadline established by that order (App. 30a).[4]

At a status conference before the District Court on August 8, 1996, the trial attorney for the City defendants made an oral application to the Court that it recertify, for the interlocutory appeal, the question of whether class certification was appropriate (App. 23a-24a). Plaintiffs initially objected to the proposed recertification of the controlling question because of fears that it would delay discovery in the case (App. 25a). However, they later withdrew the objection because the District Court required that discovery proceed regardless of recertification, and, in accordance with plaintiffs' own request, that defendants serve their motions for leave to appeal to the Court of Appeals within less than the full ten days to which they would otherwise have been entitled. Confident that the case would continue to proceed, plaintiffs acquiesced in the defendants' request that the Court vacate its July 26 order and issue another order, stating (App. 27a):

---

[4] By the time the stipulation permitting the State defendants to join in the appeal was "so ordered" by the District Court, the statutory ten-day period under Fed. R. App. P. 5(a) had passed. As such, the State defendants never had a chance to timely seek leave to appeal from the Second Circuit, as the order was deemed to apply to them nunc pro tunc. Since it was plainly the intention of all parties and the District Court that the State defendants have a meaningful opportunity to interpose an interlocutory appeal herein, this could only be effectuated by the issuance of a second certification order, after which leave to appeal could be timely sought. Moreover, since a favorable result of the State defendants' appeal from the order granting class certification would necessarily inure to the benefit of the City defendants, precluding the City defendants from participating in the interlocutory appeal would have been pointless.

> MS. LOWRY: Your Honor, obviously our concern is that discovery proceed and it is going to proceed. The only thing that I would ask though, because it is still hanging over our heads, is that the City be instructed not to take the full ten days [to seek leave from the Second Circuit] and that there be a commitment that instead of having this run again from now and an additional ten days, that they be required to submit their papers, even though they technically have the ten days, that they submit it in a shorter time.
>
> * * *
>
> I would like to make it specific. I would like to have some agreement now.

Plaintiffs' counsel also responded, "Fine," when the District Court agreed to require the State and City defendants to make their applications for leave to appeal within three business days (App. 28a). As such, plaintiffs consented to the City defendants' application for recertification, and never took exception to the ruling of the District Court granting recertification.

By memorandum and order dated August 9, 1996, the District Court issued another order pursuant to 28 U.S.C. § 1292(b), certifying the question, for interlocutory review, of whether class certification was proper (App. 19a-20a). In the August 9 order, the District Court stated that it would again exercise its discretion to certify the matter for appellate consideration, and included the requirement that defendants

serve and file their motions for leave to appeal to the Second Circuit within three business days.

B. Court of Appeals Proceedings And Decision

On August 14, 1996, three business days after the August 9 order, both the State and City defendants filed their petitions for leave to appeal to the Second Circuit, which petitions that Court granted by orders dated September 3, 1996 (App. 16a-18a). When defendants served and filed their motions in accordance with the District Court's order, plaintiffs never objected on the grounds that the motions were untimely under Fed. R. App. P. 5(a), or that the District Court had abused its discretion by recertifying the controlling question of law it had previously certified in a prior order. The entire sequence of events, moreover, was expressly recited in the District Court's August 9 order recertifying the controlling question (App. 19a-20a).

The State and City defendants served and filed their respective appellants' briefs in the Second Circuit on the merits of the class certification issue, on or about November 1, 1996. Plaintiffs moved to dismiss defendants' appeals on November 19, 1996 (App. 13a-15a). Plaintiffs thus failed to object to the recertification until about one week before their appellees' brief was due in the Second Circuit. Moreover, plaintiffs failed to allege or demonstrate any prejudice occasioned by the recertification, nor could they, inasmuch as defendants proceeded expeditiously in the District Court, and filed their motions in the Second Circuit in accordance with the time frames imposed by the District Court at plaintiffs' own request.

By order dated December 10, 1996, the United States Court of Appeals denied plaintiffs' motion to dismiss the

appeals (App. 15a). On January 8, 1997, the Court issued an opinion explaining its ruling (App. 1a-12a). The Court held that a district court has the power to recertify under § 1292(b) the order being appealed, to enable the party seeking review of such order to timely file a petition for leave to appeal to the Court of Appeals (App. 3a).

In concluding that the prior panel did have jurisdiction to consider whether to exercise its discretion to grant defendants leave to appeal, the Court of Appeals adopted the Ninth Circuit's approach in In re Benny, 812 F.2d 1133, 1137 (9th Cir. 1987), which permits a court of appeals to exercise jurisdiction over a petition to appeal from a recertified interlocutory order if "jurisdiction over the appeal would serve judicial efficiency" and thus "advances the purposes of section 1292(b)" (App. 9a). Under that approach, a circuit court has discretion to accept such an appeal after considering several factors, including the length of the delay, the reasons for failing to timely file a petition in the circuit court, and any prejudice resulting to the opposing party from the delay (App. 9a-10a). The Court of Appeals in this case emphasized that the focus of the inquiry should be on ensuring that the goal of § 1292(b) will still be satisfied by permitting an interlocutory appeal (App. 10a). The Court flatly rejected plaintiffs' contention that an appellant's negligence in failing to timely petition for interlocutory appeal strips the district court of discretion to recertify an interlocutory order, and weighed such fault as but one factor in determining whether a district court's recertification furthers the goals of § 1292(b) (App. 10a-11a).

In finding that such goals were served in this case, the Second Circuit balanced the other factors militating in favor of allowing the interlocutory appeal, including the District Court's findings in its recertification order; defendants' motion for

recertification in the District Court just three days after the original ten-day period lapsed, and their petition to the Second Circuit for leave to appeal less than one week later; and the lack of prejudice to plaintiffs resulting from the recertification (App. 11a-12a). After evaluating all circumstances surrounding the recertification request, insofar as they relate to the ultimate efficiency goals of § 1292(b), the Second Circuit denied plaintiffs' motion to dismiss defendants' interlocutory appeals (App. 12a).

REASONS FOR DENYING THE WRIT

The writ should be denied because the Court of Appeals properly exercised its discretion in granting defendants leave to appeal from the class certification order pursuant to 28 U.S.C. § 1292(b). Contrary to plaintiffs' contentions, there is no split among the circuit courts of appeals on this issue; nor does the decision below contravene any federal rules, or conflict with any decisions of this Court. To the contrary, the Second Circuit's ruling is fully consistent with this Court's decision in Baldwin County Welcome Center v. Brown, 466 U.S. 147 (1984) (per curiam), and with all applicable statutes and rules. Particularly, as the Court of Appeals concluded, certification and acceptance of the appeal here furthers the purpose and goals of 28 U.S.C. § 1292(b), which vests broad discretion in the district courts and the courts of appeals to either effectuate or deny immediate interlocutory review of certain issues, depending upon whether "a controlling question of law" is involved "as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). The exercise of discretion by those courts does not raise a substantial legal question that should be reviewed by this Court.

Defendants in the case at bar timely petitioned the Court of Appeals following the District Court's recertification for interlocutory appeal of its order granting class certification, and the District Court granted recertification in accordance with the mandates and purpose of § 1292(b) (App. 20a). Neither 28 U.S.C. § 1292(b) nor Fed. R. App. P. 5(a) sets forth any time limit for a district court to certify an order for immediate interlocutory appeal, nor is there any provision which restricts or prohibits a district court from recertifying an order which had previously been certified for interlocutory appeal. There is no language in 28 U.S.C. § 1292(b) that restricts a district court's power to recertify a question for interlocutory appeal, nor does the statute set any time limitations therefor. In fact, Fed. R. App. P. 5(a) expressly contemplates that a district court "order may be amended to include the prescribed statement [pursuant to § 1292(b)] at any time, and permission to appeal may be sought within 10 days after entry of the order as amended" (App. 38a).

The only time limit imposed by these provisions is the requirement that a petition for leave to appeal be filed in the court of appeals within ten days from the entry of the district court's order certifying the issue for appeal. That time limit is concededly jurisdictional, in that absent a timely petition in the court of appeals, that court lacks jurisdiction of the proposed interlocutory appeal. See Myles v. Laffitte, 881 F.2d 125, 126-27 (4th Cir. 1989). The court cannot enlarge the ten-day time limit for filing the petition for leave to appeal following district court certification. Id. at 126; Fed. R. App. P. 26(b). No similar time restraint or jurisdictional limitation is imposed on the district court in entering its order certifying an issue for interlocutory appeal, which order can be entered at any time prior to entry of final judgment, or an amendment to any order can be made at any time certifying an issue for

interlocutory appeal pursuant to § 1292(b) and Fed. R. App. P. 5(a). Likewise, there is no bar, jurisdictional or otherwise, preventing the district court from recertifying an issue for interlocutory appeal, provided the requirements of § 1292(b) are satisfied. In fact, by analogy, the District Court is expressly authorized under Fed. R. App. P. 4(a)(5) to "extend the time for filing a notice of appeal" upon timely motion demonstrating "excusable neglect or good cause." Thus, contrary to plaintiffs' assertion that such time can be extended only for "excusable neglect" (Petition at 11 n.11 and 15 n.19), the rule specifically authorizes the district court to grant an extension of time entirely upon a timely showing of "good cause." Fed. R. App. P. 4(a)(5).

The District Court in this case, therefore, had the discretion to recertify the class certification issue for interlocutory appeal, and the Court of Appeals had the discretion to accept the appeal, upon the timely filing of a petition for leave to appeal following the District Court's recertification, which discretion the Courts properly exercised in this case. Both acts were accordingly within the sound discretion of the respective Courts, and did not contravene any statute, rule, or decision of this Court. Plaintiffs have failed to demonstrate any "compelling reasons," or the implication of any "important federal question," or a departure from accepted and usual judicial practice, or "the misapplication of a properly stated rule of law" (see Supreme Court Rule 10), to warrant this Court's grant of certiorari in this matter, which involves the mere exercise of the lower courts' discretion.

Contrary to plaintiffs' assertion that defendants' failure to timely petition the Court of Appeals after the District Court's initial § 1292(b) certification order constituted a noncurable "jurisdictional defect" (Petition at 16), the question

at issue is not one of jurisdiction, but of abuse of discretion. The only question properly raised by plaintiffs' Petition, therefore, is whether the District Court abused its discretion in recertifying the controlling question of law which it had certified in a prior order. The answer is that it did not, since the District Court has the power to reconsider or reissue its interlocutory rulings at any time, even to amend orders for purposes of § 1292(b); defendants proceeded expeditiously after recognizing a ministerial error in their calculation of the initial ten-day period; plaintiffs consented to the recertification; and both the District Court and the Court of Appeals concluded, in the proper exercise of their discretion, and in full compliance with § 1292(b) and Fed. R. App. P. 5(a), that the underlying controlling question of law should be resolved now.

Moreover, while there can be no waiver of an objection to jurisdiction, an objection based on abuse of discretion can be waived, and in this case was in fact waived by plaintiffs. Plaintiffs abandoned their objection to recertification, thereby consenting to and acquiescing in the recertification by the District Court, provided that defendants filed their petition in the Court of Appeals within three business days following the recertification order, rather than within the full ten days allowed by the statute (App. 27a-28a). Defendants' motions were timely filed within three business days from the District Court's recertification order dated August 9, 1996, and the Court of Appeals granted defendants' motions for leave to appeal from the interlocutory order granting class certification (App. 16a-18a). As defendants' motions for leave to appeal were timely filed in accordance with the District Court's April 9 order, and the Court of Appeals granted leave to appeal (App. 16a-18a), the Court of Appeals has jurisdiction to decide the interlocutory appeal, and plaintiffs waived their objection based on the City defendants' "neglect of counsel" in

failing to file a timely petition after the initial certification order (Petition at 10).

The issue of whether the Court of Appeals had jurisdiction to accept an appeal following a timely petition for leave to appeal after a recertification order was entered by the District Court has been implicitly resolved by this Court in Baldwin County Welcome Center v. Brown, 466 U.S. 147 (1984) (per curiam). There, the Court was faced with a situation where no petition seeking leave to appeal to the Court of Appeals was ever filed within the ten-day period required by 28 U.S.C. § 1292(b) and Fed. R. App. P. 5(a). Nine months later (as opposed to the de minimis three days which elapsed before defendants sought recertification in the case at bar), a motion was made before the District Court, essentially to enlarge the time to file an interlocutory appeal. Id. at 159-60. The District Court granted the motion and the Court of Appeals granted leave to appeal.

Despite the lack of compliance with the ten-day provision, the Court asserted jurisdiction, granted review by certiorari, and reversed the judgment of the Court of Appeals on the merits. In a separate opinion, Justice Stevens expressed his disagreement with the Court's summary consideration of the issue, which the Court obviously felt did not even require comment, but agreed with the ultimate conclusion that there was no jurisdictional defect:

> It is quite plain that the District Court in the instant case recertified the interlocutory order nine months after the time for petitioning had expired for the purpose of permitting what would otherwise be a time-barred interlocutory appeal. While I think the jurisdictional question

> here is a close one, and believe that we should not decide it in a summary fashion, I concur in the majority's holding that there is jurisdiction. I am presently persuaded by the view, supported by the commentators, that interlocutory appeals in these circumstances should be permitted, notwithstanding the fact that this view essentially renders the 10-day time limitation, if not a nullity, essentially within the discretion of a district court to extend at will.

Id. at 162.

Consistent with this analysis, the courts of appeals which have considered this issue after Baldwin have held that a district court's recertification of a controlling question of law after expiration of the ten-day period following a prior certification order, does not divest the appellate court of jurisdiction to hear the appeal. According to these authorities, including the Second Circuit's ruling in the case at bar (App. 10a-11a), the relevant inquiry is whether acceptance of the appeal, in light of the district court's recertification, will further or will frustrate the purpose of 28 U.S.C. § 1292(b). See In Re Benny, 812 F.2d 1133, 1137 (9th Cir. 1987) (holding that "if a district court on reconsideration recertifies for interlocutory appeal an order that was previously certified . . . but from which the appellant failed to timely petition to appeal, the court of appeals may exercise jurisdiction . . . if it determines that jurisdiction over the appeal would serve judicial efficiency"). Accord, Nuclear Engineering Co. v. Scott, 660 F.2d 241, 247 (7th Cir. 1981), cert. denied, 455 U.S. 993 (1982) (same); see also In re La Providencia Development Corporation, 515 F.2d 94, 95-96 (1st Cir. 1975); Aparicio v. Swan Lake, 643 F.2d 1109, 1113 (5th Cir. 1981)

("The reasons for the earlier certification order continued to exist").

This Court's conclusion in Baldwin, and the weight of authority in the circuits makes sense, in light of the fact that the exercise of jurisdiction by the courts of appeals under § 1292(b), as well as certification or recertification by the district courts, is, in all instances and without exception, discretionary: "Whether to grant any timely section 1292(b) appeal is always a matter within the discretion of a court of appeals." Nuclear Engineering v. Scott, 660 F.2d at 247; see also La Providencia, 515 F.2d at 96 ("The statute explicitly provides, as does F.R.A.P. 5(a) for application to the court of appeals because the appeal from an interlocutory order certified by the district court is not one taken as of right, but one which the court of appeals may hear if it so chooses"); Aparicio, 643 F.2d at 1113 (court of appeals "can prevent any abuse at the district court's discretion merely by denying the prospective appellant permission to appeal the interlocutory order"). Moreover, Fed. R. App. P. 5(a) permits the amendment of the interlocutory order by the district court "'at any time' to supply the certification statement and provides that such an amendment triggers the running [anew] of the ten-day period for applying to [the court of appeals] for permission to appeal." Aparicio v. Swan Lake, 643 F.2d at 1112; see also Note, Interlocutory Appeals in the Federal Courts Under 28 U.S.C. § 1292(b), 88 Harvard L. Rev. 607, 615-16 (1975).

Plaintiffs' assertion that there is a "conflict" among the circuit courts, which have rendered "inconsistent" decisions on this issue (Petition at 7, 13), is not correct. While the circuits may differ in when and how to exercise their discretion to accept an interlocutory appeal following a recertification by the district court, depending upon the particular circumstances

presented, and considering the various factors involved (as the Court of Appeals did here), it appears that no court which has considered the issue has found an absolute jurisdictional bar to the district court recertifying an issue for interlocutory appeal after expiration of the initial ten-day period.

In Woods v. Baltimore and Ohio Railroad Company, 441 F.2d 407 (6th Cir. 1971) (Petition at 8), the Sixth Circuit concluded that it was without jurisdiction to consider the interlocutory appeal because the District Court there merely vacated its prior order and then refiled it one hour later, without the benefit of any "reconsideration" of the prior order. Id. at 408. The Sixth Circuit expressly did not reach "the question of whether, following expiration of the time period for the filing of an application for permission to appeal, the Court of Appeals could acquire jurisdiction upon the District Court's reconsideration of its prior order and the timely filing of an application after the entry of such order upon reconsideration." Id.[5] Moreover, the Sixth Circuit decided Woods thirteen years before this Court's decision in Baldwin.

In the case at bar, the District Court, in its August 9, 1996 order, recounted the relevant procedural history, and reconsidered and reaffirmed its prior § 1292(b) certification upon defendants' request that the District Court "again to exercise its discretion to certify this matter for appellate

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[5] In Nakhleh v. Chemical Construction Corporation, 366 F.Supp. 1221 (S.D.N.Y. 1973) (Petition at 8), the district court, construing Woods, also concluded that "the mere refiling of an order did not constitute a reconsideration," and recognized that the district court retains jurisdiction of the case, and that prior to final judgment, all interlocutory decisions are subject to reconsideration. Id. at 1223.

consideration" (App. 19a-20a). Moreover, the District Court's recertification order served the additional purpose of incorporating the parties' stipulation, which the Court "so ordered," permitting the State defendants to appeal from the underlying interlocutory order on the merits (App. 30a-31a; see 3 n. 3 supra). Accordingly, the procedure utilized, and result reached, in the case at bar, is not inconsistent with the Sixth Circuit's analysis in Woods, since the District Court's recertification of its prior order was the result of a careful reconsideration of the facts before it and of the continuing need for the interlocutory appeals.

Thus, the purported "conflict" and "continuing split" among the circuits upon which plaintiffs place such heavy reliance (Petition at 7, 19), does not exist. Rather, the decisions reflect nothing more than different courts exercising their discretion in different ways, and considering various factors, in determining when and under what circumstances to grant leave to appeal from an interlocutory order which had been previously certified pursuant to § 1292(b), but for which the ten-day period to apply to the court of appeals for permission to appeal had lapsed.

Even assuming arguendo, that plaintiffs' challenge to the District Court's recertification order raises jurisdictional concerns, they do not bar the instant appeals based on the circumstances here. Even the cases relied upon by plaintiffs (Petition at 15), implicitly recognize that there are exceptions to strict compliance with the ten-day period set forth in 28 U.S.C. § 1292(b). For example, in Braden v. University of Pittsburgh, 552 F.2d 948 (3d Cir. 1977), the Third Circuit rejected the argument that permitting recertification would circumvent the ten-day rule, and reasoned that permitting recertification can serve the purpose of § 1292(b) in materially

advancing the litigation. Braden, 552 F.2d at 952. In both Braden and Woods, the courts relied upon the fact that the "neglect" of counsel can be a relevant factor in determining jurisdiction, thus acknowledging that failure to comply with the ten-day rule does not deprive the courts of appeals of jurisdiction to hear the appeal in all cases.

Contrary to plaintiffs' argument (Petition at 13-19), recertification of interlocutory orders does not contravene any federal statutes or rules, or this Court's decision in Carlisle v. United States, __ U.S. __, 116 S. Ct. 1460 (1996). Carlisle involved Fed. R. of Crim. P. 29(c) and 45(b), which clearly, plainly and unambiguously prohibit the granting of an untimely postverdict motion for judgment of acquittal. In light of the plain language of those rules, this Court held that "[t]here is simply no room in the text of Rules 29 and 45(b) for the granting of an untimely postverdict motion for judgment of acquittal, regardless of whether the motion ... was filed late because of attorney error." Id. at 1464. This Court recognized that federal courts have no power to develop rules that circumvent or conflict with the Federal Rules of Criminal Procedure. Id. at 1466. No such similar circumvention or disregard of plain and unambiguous statutory deadlines is at issue here. To the contrary, there is no statutory time limit for a district court's § 1292(b) certification of an interlocutory order, which can be entered, or reentered, at any time, or amended at any time to include the prescribed language. See Fed. R. App. P. 5(a). By contrast, the ten-day time limit set forth in § 1292(b) is similar to the seven-day time limit of Fed. R. Crim. P. 29(c) and 45(b), in that neither can be alleviated or changed by the courts. See Fed. R. App. P. 26(b). However, unlike the petitioner in Carlisle, defendants in the case at bar timely made their motion to the Court of Appeals within the applicable statutory deadline.

Since the order appealed from is interlocutory, the District Court continues to exercise plenary control over the underlying litigation, and a hard and fast rule that the District Court cannot recertify a controlling question of law makes no procedural sense. A question of law is controlling when the District Court concludes that "there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). The resolution of such a question does not lose its immediacy in the event that the ten-day period is inadvertently allowed to run. This is not to say that delay, neglect of counsel, or other such factors are irrelevant to the inquiry. However, as the Fifth Circuit opined:

> A contrary interpretation of the statute would preclude an interlocutory appeal under circumstances in which the criteria of the statute are satisfied and both the district court and this court have concluded that an interlocutory appeal is appropriate . . . [W]e can prevent any abuse of the district court's discretion merely by denying the prospective appellant permission to appeal the interlocutory order.

Aparicio v. Swan Lake, 643 F.2d at 1112-13.

Thus, the issue here is not jurisdictional, but whether the District Court abused its discretion by recertifying the controlling question of law for immediate appeal. On the facts presented, it did not. Moreover, as the Court of Appeals recognized, not only did plaintiffs not object in the District Court to the recertification, they in fact consented to the recertification and made certain requests that the Court impose

conditions, to which the Court and defendants agreed (App. 27a-28a). The District Court's order was thus limited to allow only three business days after recertification for the defendants to file their motions in the Court of Appeals. Furthermore, the defendants' motion to the District Court to recertify the controlling question was brought only three days after the original ten-day deadline lapsed, and was necessitated by a mere ministerial error in calculating the original time period. For these reasons, plaintiffs cannot have sustained any prejudice from the procedure followed by the District Court, nor have they alleged any. See Nuclear Engineering, 660 F.2d at 247; Braden v. University of Pittsburgh, 552 F.2d at 954-55 (prejudice to the appellee is a factor to be considered by the courts in exercising discretion to re-enter certification order). The total lack of prejudice to plaintiffs is underscored by their tardiness in raising this jurisdictional challenge, as the Court of Appeals aptly observed (App. 11a). In fact, plaintiffs waited to do so until after defendants had filed their briefs on the merits of the class certification issue, and one week before their opposing brief was due to be filed.[6]

Acceptance of the appeal by the Court of Appeals, moreover, was entirely proper and consistent with the intent of 28 U.S.C. § 1292(b). Since defendants' failure to file their motions for leave to appeal within the initial ten-day period

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[6] Plaintiffs argue that defendants' "[f]ailure to comply with the jurisdictional requirements for interlocutory appellate review would be without prejudice to [their] right to raise the same issue after final judgment" (Petition at 2 n.1). This argument not only runs counter to the purpose of interlocutory review, but plaintiffs fail to acknowledge that they, too, are not precluded from raising the arguments they advance in support of this petition at a future date, in the event that they do not prevail on the interlocutory appeal.

was clearly inadvertent, there was no intent to circumvent the applicable time frames. In addition, there was no delay in the defendants' prosecution of their appeals as a result of the recertification. Also, as the District Court and the Court of Appeals emphasized, the acceptance of these interlocutory appeals furthers these interests promoted by 28 U.S.C. § 1292(b) (App. 10a-12a, 20a). The question of class certification is still an issue which will determine the future course of this litigation, and which still needs to be definitively settled before the trial, which is scheduled for mid-November, 1997. That there is substantial merit to the appeal is also demonstrated, if nothing else, by the fact that both the Court of Appeals and the District Court agreed that the certified question should be resolved immediately.

In sum, there was no statutory or legal prohibition precluding the District Court from recertifying pursuant to § 1292(b) the interlocutory order at issue here. Nor was there any jurisdictional bar to the Court of Appeals accepting this appeal upon timely application following such certification. Whether or not to grant § 1292(b) certification or leave to appeal are matters within the sound discretion of the district courts and the courts of appeals, respectively. The different conclusions reached by the circuits that have considered this issue depend upon a consideration and balancing of the various factors and particular circumstances of each case, and do not create a split of authority or a conflict among the circuits, or warrant review by this Court.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

MARISOL A., by her next friend,
Rev. Dr. James Alexander Forbes, Jr., *et al.*,

Petitioners,

—v.—

RUDOLPH W. GIULIANI, as Mayor
of the City of New York, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

In an attempt to obscure what is clearly a matter for this Court's plenary review, Respondents' Brief in Opposition misstates the facts and issue presented, and relies upon a strained interpretation of the law.[1] However, Respondents cannot avoid the jurisdictional import of the question Petitioners have placed before this Court, the resolution of which will serve both to cure a significant split among the circuits and to give effect to the statute and implementing federal rules governing interlocutory appeals.

The core of Respondents' Brief in Opposition consists of two inaccurate contentions: (i) that no split exists among the circuits regarding whether an interlocutory order may be recertified for the sole purpose of permitting an otherwise time-barred appeal; and (ii) that the issue before this Court is not one of jurisdiction but of discretion.[2] Both propositions are refuted by Justice Stevens' dissenting opinion in *Baldwin County Welcome Center* v. *Brown*, 466 U.S. 147, 152 (1984) (*per curiam*), and the Second Circuit opinion now before this Court (104 F.3d 524; App. 1a-12a).

Respondents' Brief in Opposition consistently strays from the question that lies at the heart of this petition, namely whether district courts in fact have the power to recertify (that is, to certify for a second time) an interlocutory order solely

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[1] Citations to "App. __" refer to the Appendix to the Petition for Writ of Certiorari. The Petition itself is hereinafter referred to as "the Petition" or "Petition". References to Respondents' Brief in Opposition are herein cited as "Br. Opp."

[2] Respondents' discussion of the "so ordered" stipulation permitting State Defendants to join in the City's interlocutory appeal is a red-herring. (Br. Opp. at 4n.) *Prior* to the expiration of the initial 10-day certification period (August 5, 1996), the parties stipulated that the State could join in the City's interlocutory appeal *nunc pro tunc* and that the 10-day period would not be "extended by virtue of [the] stipulation." (App. 30a.) The court "so ordered" *that* agreement. (App. 30a-31a.)

to cure a would-be appellant's failure to comply with a jurisdictional time limitation. Respondents instead argue that the proper question is whether the district court abused its discretion in recertifying the order for immediate appeal. If this is a proper inquiry at all, it is a secondary one—never reached if the district court lacks the power, as Petitioners argue, in the first instance, to recertify an order for interlocutory appeal.

By recertifying its order for interlocutory appeal, the district court rendered meaningless the 10-day jurisdictional time limitation established by both statute and the federal rules. Without this Court's guidance, the law will remain in a state of confusion and this jurisdictional time limitation will remain without effect.

THE REASONS FOR GRANTING THE WRIT ARE UNDERSCORED BY RESPONDENTS' MISSTATEMENT OF THE ISSUE AND THEIR STRAINED READING OF THE APPLICABLE LAW.

A. The Circuits Are Divided.

Unable to overcome the import of the issue raised by this Petition, Respondents insist (in the face of considerable authority to the contrary) that the circuits are not divided on the issue before this Court. (Br. Opp. at 8.) However, the split among the circuits regarding whether a district court can recertify an interlocutory order for immediate appeal for the sole purpose of extending the time for appeal was squarely recognized by Justice Stevens in his *Baldwin County* dissent. 466 U.S. at 161 (Stevens, J., dissenting). Citing the very cases Petitioners contend establish the circuit split, Justice Stevens acknowledged that "[t]here is a conflict in the Circuits on this jurisdictional question. . . ." *Baldwin County*, 466 U.S. at 161-62 (Stevens, J., dissenting). The Second Circuit likewise recognized the conflict among the circuits on this question when it undertook to explain its holding "[i]n light of varying

approaches in other circuits to the jurisdictional issues raised by [Petitioners]. . . ." (104 F.3d at 525; App. 3a.)[3] Indeed, the Second Circuit's opinion surveys the tripartite split among the circuits on the recertification issue, expressly choosing to follow the approach advocated by the Ninth Circuit. (104 F.3d at 527-28; App. 7a-10a.) Respondents' insistence that "there is no split among the circuit courts of appeals on this issue" (Br. Opp. at 8) is flatly incorrect.

Respondents' reading of the majority opinion in *Baldwin County* virtually begs this Court for guidance on the issue of recertification. Despite the Second Circuit's explicit recognition that the Supreme Court has never "squarely addressed the issue of whether a circuit court has jurisdiction to consider a § 1292(b) petition in this situation"[4] (104 F.3d at 527; App. 6a), Respondents repeatedly argue that this Court's decision in *Baldwin County* definitively established that a district court has the power to recertify an interlocutory order for immediate appeal.[5] Respondents fail to acknowledge that the

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[3] In further recognition of the existing circuit split the Second Circuit stated that, in his dissent in *Baldwin County*, "Justice Stevens (joined by Justices Brennan and Marshall) noted a circuit split on the jurisdictional issue. . . ." (104 F.3d at 527; App 7a.)

[4] The Second Circuit's opinion makes clear that the court does not view *Baldwin County* as determinative of the recertification issue. As the Second Circuit stated:

> "The [*Baldwin*] majority reached the merits of the appeal without even mentioning [the recertification issue]. . . . Although defendants cite *Baldwin* as implicit support for the district court's power to recertify an order, the issue bears further exploration in view of the majority's silence on the issue." (104 F.3d at 527; App 7a.)

The Second Circuit is not alone, as seen by other post-*Baldwin County* decisions. *See Myles* v. *Laffitte*, 881 F.2d 125, 126 n.2 (4th Cir. 1989) ("[i]t is not clear . . . whether a district court may in effect enlarge the time for appealing from a certified order by vacating and reentering or amending an order of certification so as arguably to commence the running anew of the 10 day period."); *see also Benny* v. *England* (*In re Benny*), 812 F.2d 1133 (9th Cir. 1987) (not referencing *Baldwin County*).

[5] *See* Br. Opp. at 8, 12, 14.

Baldwin County majority never addressed the issue of recertification or that Justice Stevens' opinion therein is a dissent.[6] *See* 466 U.S. at 152 (Stevens, J., dissenting). Moreover, as noted in the Petition for Writ of Certiorari (Petition at 12 n.14), this Court's majority opinion in *Baldwin County*—holding that a 90-day filing time limit should be strictly enforced—supports *Petitioners'* point herein. *See Baldwin County*, 466 U.S. at 152 ("[p]rocedural requirements established by Congress for gaining access to the federal courts are not to be disregarded by courts . . . ."). Respondents read far more into *Baldwin County* than it can support.

Despite Respondents' attempt to cast the *Baldwin County* majority's silence as determinative of the recertification issue, this Court has repeatedly held that the majority's silence on an issue cannot be interpreted as tacitly resolving an issue not addressed in its opinion. "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to

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[6] At the August 8, 1996 district court hearing at which they orally sought recertification without having filed any papers or provided any notice, Respondents misleadingly asserted, as they do throughout their Brief in Opposition, that this Court resolved the question of whether district courts may recertify interlocutory orders for immediate appeal for the sole purpose of curing a failure to timely petition the circuit court for appeal in *Baldwin County*. (App. 26a.) Respondents also contend that Petitioners should have raised this jurisdictional issue earlier. It is axiomatic, however, that jurisdictional questions are not subject to waiver and indeed that courts have an obligation to review jurisdictional questions *sua sponte*. *See Baldwin County*, 466 U.S. at 162 (Stevens, J., dissenting); *see also Bender* v. *Williamsport Area School District*, 475 U.S. 534, 541 (1986) ("every federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review' " (citation omitted)); *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency*, 440 U.S. 391, 398 (1979) ("even if not raised by the parties, we cannot ignore the absence of federal jurisdiction"); *United States* v. *Griffin*, 303 U.S. 226, 229 (1938) ("lack of jurisdiction of a federal court touching the subject matter of the litigation cannot be waived by the parties").

constitute precedents." *Webster* v. *Fall*, 266 U.S. 507, 511 (1925); *accord United States* v. *Shabani*, 513 U.S. 10, 16 (1994). This tenet applies equally to jurisdictional questions.[7]

As Petitioners demonstrate, and as the Second Circuit recognized, the issue of whether a district court can recertify an interlocutory order for immediate appeal for the sole purpose of permitting an otherwise time-barred interlocutory appeal remains unsettled by this Court. As set forth in detail in the Petition, lack of definitive guidance from this Court has led to confusion and conflict among the circuit courts, now underscored by Respondents' strained reading of *Baldwin County*. Petitioners respectfully urge the Court to speak to this important jurisdictional issue.

B. Whether The District Court Can Recertify An Interlocutory Order For Immediate Appeal Is A Threshold Jurisdictional Issue.

At the core of Respondents' Brief in Opposition is the contention that "the question at issue is not one of jurisdiction, but of abuse of discretion." (Br. Opp. at 10-11.) However, in the very case Respondents claim is dispositive here, Justice Stevens concisely and accurately set forth the issue Petitioners place before the Court:

> The *jurisdictional* question in this case is whether the 10-day time limitation imposed by § 1292(b) and Federal Rule of Appellate Procedure 5(a), a time period which may not be enlarged, Fed. Rule App. Pro. 26(b), can be

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[7] As this Court stated in *Hagans* v. *Lavine*, 415 U.S. 528, 534 n.5 (1974):

> "[W]hen questions of jurisdiction have been passed on in prior decisions sub silentio, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us."; *see also United States* v. *More*, 3 Cranch 159, 172 (1805) (Marshall, C.J.) ("No question was made, in that case, as to the jurisdiction. It passed sub silentio, and the court does not consider itself bound by that case.").

> circumvented by simply reentering the interlocutory order for the sole purpose of extending the time for filing the petition. 466 U.S. at 161 (Stevens, J., dissenting) (emphasis added).

The Second Circuit likewise recognized the threshold, jurisdictional nature of this issue, stating that:

> The basic question raised by the motion was whether a district court *has the power to recertify* under § 1292(b) the order appealed from to enable the party opposing such order to file with this court a timely petition for leave to appeal. (104 F.3d at 525-26; App. 3a) (emphasis added).

Although Petitioners respectfully dispute their conclusions, Justice Stevens and the Second Circuit accurately framed the jurisdictional issue now before this Court. Respondents' attempt to divert attention from the cert-worthiness of this Petition by touting this as an issue of discretion, rather than jurisdiction (Br. Opp. at 10-11), is refuted by both Justice Stevens' *Baldwin County* dissent and the Second Circuit's opinion now before this Court.[8]

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[8] That the Second Circuit considers the issue jurisdictional was recently reiterated. Upon learning of this Petition, and without any party having sought a stay of proceedings, the Second Circuit adjourned the scheduled argument of this appeal *sua sponte* pending this Court's resolution of the threshold jurisdictional issue.

It is well-settled, and Respondents here concede, that a party cannot waive an objection to jurisdiction and courts must raise the issue *sua sponte*. *See supra* note 6. Nonetheless, Petitioners in no way waived or "withdrew the objection." (Br. Opp. at 4.) To the contrary Petitioners repeatedly and unequivocally objected. (App. 25a.) Only *after* it became clear that the court was going to grant the extension (at the same hearing in which it was requested without notice or briefing) did Petitioners attempt to mitigate the damage by urging the court to keep discovery moving forward.

Petitioners concede that whether to certify an order for interlocutory review under 28 U.S.C. § 1292(b) is within the discretion of the district court. Logically, therefore, *if* the district court has the power to recertify an interlocutory order for immediate appeal, a decision to exercise that power would also be discretionary. However, as set forth in detail in the Petition for Writ of Certiorari, Petitioners contend that the district court has no such power; that recertification violates the plain meaning of the 10-day time limitations established by both § 1292(b) and Federal Rules of Appellate Procedure 2, 5(a) and 26(b); and that recertification directly conflicts with this Court's recent holding in *Carlisle* v. *United States*, U.S. ___, 116 S. Ct. 1460 (1996).

In support of their contention that this issue is one of discretion, Respondents' opposition confuses three distinct concepts: (1) *amending* an order that does not include requisite certifying language to include that language;[9] (2) *reconsidering* the merits underlying an interlocutory order in the face of new law or facts and issuing a new order;[10] and (3) *recertifying* an order for interlocutory appeal by simply cer-

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[9] While Respondents are correct that under Fed. R. App. P. 5(a) an interlocutory order may be amended "at any time," the plain language of Rule 5(a) permits amendment for only one purpose: "to include the prescribed statement" from 28 U.S.C. § 1292(b). Fed. R. App. P. 5(a). Here, the initial certification order contained the statement required by § 1292(b) (*see* App. 32a-33a), so the provision permitting amendment cannot justify, and is not at all implicated by, the second certification of the same order.

[10] Respondents' Counsel did not seek reconsideration of either the underlying class certification order or the first order certifying the question for interlocutory appeal, but simply asked the district court to "recertify this issue for interlocutory appeal." (App 23a.) Any reference to reconsideration would be wholly inappropriate in this context. Respondents did not request that the court reconsider the merits of the underlying class certification order and (as the prevailing party) are the wrong party to seek reconsideration of the July 26, 1996 certification for interlocutory appeal.

tifying the same order a second time for the sole purpose of granting a would-be appellant an additional 10-day period within which to "timely" file. The clear distinction between reconsideration and recertification has been recognized by several courts in refusing to permit recertification. *See Woods* v. *Baltimore & Ohio R.R.*, 441 F.2d 407, 408 (6th Cir. 1971) (*per curiam*); *Nakhleh* v. *Chemical Construction Corp.*, 366 F. Supp. 1221, 1223 (S.D.N.Y. 1973). Despite Respondents' intepretation of *Woods* (Br. Opp. at 15), the facts in that case, deemed impermissible by the Sixth Circuit, are exactly the same as those here: re-entry of the same certification order by the district court for the sole purpose of permitting an otherwise time-barred petition to the circuit court.

C. This Court's Recent Ruling In *Carlisle* v. *United States* Must Be Given Effect.

In an attempt to distinguish this Court's recent holding in *Carlisle* v. *United States*, 116 S. Ct. 1460 (1996), Respondents assert that "[n]o such similar circumvention or disregard of plain and unambiguous statutory deadlines is at issue here." (Br. Opp. at 17.) However, in his *Baldwin County* dissent Justice Stevens posed the issue as:

> [w]hether the 10-day time limitation imposed by § 1292(b) and Federal Rule of Appellate Procedure 5(a), a time period which may not be enlarged, Fed. Rule App. Proc. 26(b), *can be circumvented* by simply reentering the interlocutory order for the sole purpose of extending the time for filing the petition. 466 U.S. at 161 (Stevens, J., dissenting) (emphasis added).

Justice Stevens concluded that "interlocutory appeals in these instances should be permitted, *notwithstanding the fact that this view essentially renders the 10-day time limitation if not a nullity, essentially within the discretion of a district court to extend at will.*" *Baldwin County*, 466 U.S. at 162 (Stevens, J., dissenting) (emphasis added). Petitioners

respectfully submit that the *Carlisle* Court's holding that district courts lack the power to develop rules that circumvent or conflict with federal rules or constitutional or statutory provisions, *Carlisle*, 116 S. Ct. at 1466, casts serious doubt upon the viability of this conclusion.

The facts of this case are virtually identical to those in *Carlisle*: a plain, unambiguous statutory filing deadline, established both in statute and applicable rules of procedure, was circumvented by the district court. Just as the district court in *Carlisle* could not circumvent the time limits of the Federal Rules of Criminal Procedure, neither may the district court here disregard the 10-day jurisdictional time limit imposed by § 1292(b) and Fed. Rule App. P. 5(a). The statute and implementing federal rules at issue are clear on their face: § 1292(b) expressly requires petitions for appeal to be filed within 10 days, and Fed. R. App. P. 5(a) adds a singular, limited clarification that the 10 days only begin to run after the court has amended its order to include the certifying language. In addition, Fed. R. App. P. 26(b) precludes enlargement of the 10-day period, and Fed. R. App. P. 2 prohibits suspension of this requirement.[11] Respondents' suggestion that nothing prohibits district courts from recertifying an interlocutory order at will for the sole purpose of aiding a dilatory would-be appellant ignores the plain meaning of § 1292(b) and these three federal rules, disregards this Court's holding in *Carlisle*, and renders the jurisdictional 10-day time limitation a nullity.

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[11] Respondents assert that "by analogy, the District Court is expressly authorized under Fed. R. App. P. 4(a)(5) to 'extend the time for filing a notice of appeal' upon timely motion demonstrating 'excusable neglect or good cause.' " (Br. Opp. at 10.) To the contrary the absence of a similar provision in Fed. R. App. P. 5(a) demonstrates that neither excusable neglect nor good cause (neither of which is present here) may extend the time to petition for interlocutory appeal. *See, e.g., United States* v. *Shabani*, 513 U.S. 10, 14 (1994) ("[i]n light of this additional element in the general conspiracy statute [§ 371], Congress' silence in § 846 speaks volumes"); *see also Carlisle*, 116 S. Ct. at 1465.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Dated: New York, New York
April 23, 1997

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